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EDITOR'S NOTE

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o. 85-473-CFX
tatus: GRANTED

Title: Cargill, Inc. and Excel Corporation, Petitioners
v.
Monfort of Colorado, Inc.

ocketed:
eptember 19, 1985

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Hanley, Robert F., Carr, Ronald G.

Counsel for respondent: McClearn, William C.

ntry	Date	Note	Proceedings and Orders
1	Jun 20 1985		Application for extension of time to file petition and order granting same until September 20, 1985 (White, June 21, 1985).
2	Sep 19 1985	G	Petition for writ of certiorari filed.
3	Sep 19 1985		Appendix of petitioner Cargill, Inc., et al. filed.
4	Sep 19 1985	G	Motion of petitioners for leave to submit Rule 28.1 material under seal filed.
6	Oct 15 1985		Order extending time to file response to petition until November 22, 1985.
7	Oct 16 1985		Petitioners' request to rescind the order given to respondent's extending their time to file a brief in
8	Oct 16 1985		opposition filed, and order denying same by White, J., on October 17, 1985.
9	Nov 4 1985		Brief amicus curiae of United States filed.
10	Nov 22 1985		Brief of respondent in opposition filed.
11	Nov 26 1985		DISTRIBUTED. December 13, 1985
13	Dec 16 1985		Motion of petitioners for leave to submit Rule 28.1 material under seal GRANTED. Justice Blackmun OUT.
14	Dec 16 1985		REDISTRIBUTED. January 10, 1986
15	Jan 13 1986		Petition GRANTED. Justice Blackmun OUT.
			**
17	Jan 29 1986		Order extending time to file brief of petitioner on the merits until March 29, 1986.
19	Jan 29 1986		Order extending time to file brief of respondent on the merits until May 12, 1986.
20	Feb 8 1986		Record filed.
21	Feb 8 1986		Certified copy of C.A. proceedings received 2/7/86 and original record received, Vols. I-IX. Box.
22	Mar 19 1986		Record filed.
23	Mar 19 1986		Three boxes and 1 flat package of certified sealed exhibits received from USDC.
24	Mar 24 1986		DISTRIBUTED. March 28, 1986. (Motion of parties to permit filing one vol. of joint appendix under seal).
25	Mar 21 1986	G	Motion of the parties to permit filing one volume of joint appendix under seal filed.
26	Mar 28 1986	G	Motion of The Business Roundtable for leave to file a brief as amicus curiae filed.
27	Mar 31 1986		Motion of the parties to permit filing one volume of joint appendix under seal GRANTED. Justice Blackmun OUT.
28	Mar 28 1986		Brief of petitioners Cargill, Inc., et al. filed.

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ntry	Date	Note	Proceedings and Orders
29	Mar 28 1986		Brief amicus curiae of United States filed.
30	Apr 3 1986		Joint appendix filed.
31	Apr 3 1986		*Volumes I and II received and filed. Two additional boxes containing Volumes I, II, and III received SEALED.
32	Apr 7 1986		Motion of The Business Roundtable for leave to file a brief as amicus curiae GRANTED. Justice Blackmun OUT.
33	Apr 11 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
34	Apr 21 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Blackmun OUT.
35	May 12 1986		Brief of respondent Monfort of Co., Inc. filed.
36	May 12 1986		Brief amicus curiae of Royal Crown Cola Co. filed.
37	Jul 17 1986		CIRCULATED.
38	Jul 28 1986		SET FOR ARGUMENT. Monday, October 6, 1986. (4th case). (1 hour).
39	Aug 21 1986	X	Reply brief of petitioners Cargill, Inc., et al. filed.
40	Oct 6 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-473 (1)

No. ——

In The

Supreme Court of the United States

October Term, 1985

Cargill, Inc. and Excel Corporation,
Petitioners,

v.

Monfort of Colorado, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

QUESTIONS PRESENTED

1. Is a competitor fearing heightened competition entitled to an injunction against one rival's acquisition of another on the ground that increased concentration and a "deep pocket" inherently "threaten" competitors with predation and therefore "loss" under Clayton Act § 16?

2. Under Clayton Act § 7, may a court condemn a merger that increases concentration within a particular segment of an intensely competitive industry without considering either competition from immediately adjacent industry segments or other factors that prevent noncompetitive behavior?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

CARGILL, INC. and EXCEL CORPORATION,
Petitioners,

v.

MONFORT OF COLORADO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Cargill, Inc. ("Cargill") and Excel Corporation ("Excel") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on April 23, 1985, which affirmed an order of the United States District Court for the District of Colorado permanently enjoining Excel's proposed acquisition of the Spencer Beef Division of Land O'Lakes, Inc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, reproduced as Appendix A at 1a-22a, is reported at 761 F.2d 570. The opinion of the United States District Court for the District of Colorado, entered on December 1, 1983, and reproduced as Appendix B at 23a-73a, is reported at 591 F. Supp. 683. The judgments of the Court of Appeals and the District Court are reproduced as Appendix C and Appendix D, respectively, at 74a-75a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1985. On June 21, 1985, Mr. Justice White

issued an order, reproduced as Appendix E at 76a, granting petitioners' application to extend the time within which to file a petition for a writ of certiorari to and including September 20, 1985. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), is reproduced as Appendix F at 77a-79a. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), is reproduced as Appendix G at 79a.

STATEMENT OF THE CASE

1. *Summary*: Monfort of Colorado, Inc. ("Monfort"), is one of the five largest firms in the cattle slaughter and beef fabrication industry.[1] Monfort brought this action in the District Court for the District of Colorado[2] to enjoin, under Section 16 of the Clayton Act, Excel's pending acquisition of the Spencer Beef Division of Land O'Lakes, Inc. ("Spencer"). Excel and Spencer are also major cattle slaughterers and beef fabricators. At the time of the proposed acquisition, Spencer's Nebraska plant, which accounted for nearly half its output and which had competed directly with Monfort's Nebraska plant in purchasing cattle from Nebraska feedlots, was closed. Excel planned to upgrade and reopen this plant upon consummation of the acquisition.

Monfort contended that the acquisition violated Section 7 of the Clayton Act principally because it would unduly increase concentration in the segments of the beef industry in which Monfort, Excel and Spencer all compete.

[1] As used in this petition, and generally in the industry, slaughter or "packing" means the slaughter of cattle and their reduction to carcasses; "fabrication," "processing," or "breaking" means the cutting of carcasses into smaller cuts of beef and the production of by-products.

[2] Monfort invoked the District Court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 (1982).

The lower courts agreed and held the acquisition unlawful on this account.

By resting on increases in concentration, the plaintiff and the courts below relied on the traditional fear of horizontal mergers and the basic concern of Section 7 of the Clayton Act. The statutory concern is that the merging firms might themselves acquire power over price; or that a reduction in the number of significant firms might make it easier for them to form and monitor a price fixing agreement; or that the increased concentration might create or reinforce the capacity of "oligopolists" to maintain non-competitive prices (depressed buying prices or elevated selling prices) through interdependent parallel pricing.[3] Because the last is the most frequently stated concern, we will use the shorthand "oligopoly pricing" to describe this standard Section 7 concern with horizontal mergers.

In adopting the "oligopoly pricing" theory of liability, the Court of Appeals recognized that Monfort could not be injured under that theory; as a competitor of Excel and Spencer, it would be benefited by lower buying prices and higher selling prices. App. 7a. Accordingly, Monfort relied on a radically different theory of injury to itself. It asserted that the acquisition would actually increase competition in the buying of cattle and the selling of beef, but that increased competition would ultimately lead to the exit of less efficient firms, perhaps including Monfort itself. Although Monfort specifically disclaimed predation by Excel alone or in conjunction with anyone else, the Court of Appeals held that Monfort was entitled to injunctive relief under Section 16 of the Clayton Act because it was "threatened" with "loss" resulting from

[3] *E.g., United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964) ("As [oligopoly] develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge"). *See also* Kauper, "The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure," 71 *Calif. L. Rev.* 497 506 (1983).

potential predatory pricing by the merged firm. App. 7a. The court found a sufficient threat of such loss was established solely by the concentration-increasing nature of the acquisition and Cargill's "large" assets. App. 12a-13a, 20a.

2. *The Beef Industry*: The parties' business, in general terms, consists of purchasing cattle, slaughtering them, and fabricating the resulting carcasses into smaller cuts of beef for resale to retailers, restaurants, hotels and institutions. Beef slaughterers buy cattle from individual ranchers and commercial feedlots and sell the slaughtered cattle in the form of carcasses either to fabricators or directly to retailers, especially large grocery chains, which fabricate the carcasses themselves. App. 27a. Alternatively, a slaughterer may itself operate a fabrication facility either physically integrated with the slaughterhouse or located elsewhere. *Id.* The slaughterers' and fabricators' net revenues are the difference between their input costs—the prices they must pay for cattle or cattle carcasses, plus operating costs—and the prices at which they sell cattle carcasses or beef cuts. Because input costs are high relative to selling prices, margins on sales in the beef industry are low. *Id.* Nevertheless, these sales margins may afford profitable returns to capital investment.[4]

The beef industry has experienced two fundamental changes in the last forty years. First, cattle feeding has shifted increasingly to the Central United States. Before World War II, cattle generally were shipped from ranchers throughout the United States to slaughterers in urban transportation hubs. Tr. 38-39 (Monfort). Since World War II, however, cattle (particularly steers and heifers) increasingly have been shipped to ranchers and commercial feedlots in grain-growing areas in the central por-

[4] Monfort, for example, was the 241st largest industrial firm in the nation on the basis of sales in 1985. While it ranked 427th in the category of margin on sales (*i.e.*, net income as a percent of sales), it ranked 80th in the category of return on stockholders' equity, with a 19.3 percent return. *Fortune*, April 29, 1985 at 274.

tion of the country. Tr. 41-42 (Monfort). There, they are fattened on grain and then sold for slaughter. These grain-fattened steers and heifers, known in the industry as "fed cattle," now account for roughly seventy percent of all cattle slaughtered; the remainder are (1) steers and heifers that continue to be ranged on grass—so-called "non-fed cattle"—and (2) cows and bulls that are used principally for the production of ground beef. App. 28a. This general migration of the feeding function to the central states has led many slaughter plants to locate in that area in order to minimize transportation costs. App. 28a.

The second major change is that fabrication facilities have moved closer to the slaughter plants. Prior to the mid-1960's cattle carcasses were mostly shipped whole to fabricators, many of which were integrated with large-scale retailers. Pl. Ex. 60 at 2. In the mid-1960's, the development of vacuum packing technology made it possible for fabricators located near slaughter plants—with which they were frequently (but not always) physically integrated—to seal smaller cuts of the carcasses in airtight packages and ship them in boxes to wholesale and retail outlets. *Id.* This process of producing and shipping "boxed beef" may result, depending on plant locations, in both transportation savings (because less bone and fat is shipped) and increased product shelf-life.[5] App. 29a.

Because of these changes, firms with slaughter plants in heavy cattle-feeding areas, and particularly those with boxing operations, have tended to displace the least efficient of the "old-line" urban slaughter plants and the fabricators that do not vacuum pack. Tr. 131 (Monfort). But this displacement has not been complete. Many urban fabricators, including those integrated with large retailers, continue to purchase carcasses and process them

[5] While the fabricator cuts the carcass into various whole pieces before "boxing" them, those pieces still require further "butchering" before they can be sold as, for example, steaks or roasts by retailers. Pl. Ex. 74 Att. 8 (Pace Testimony).

into beef cuts, which they may or may not vacuum pack. As the District Court found, these firms currently account for 28 percent of beef fabrication. App. 29a. Moreover, some slaughter houses continue to operate outside the central states area and many operate independently of fabricators. Tr. 275-76 (Fielding). In fact, while both of Monfort's plants are integrated, IBP, Inc. (the largest firm in the industry) Excel and Spencer all have significant slaughter or fabrication capacity in unintegrated facilities. Tr. 33 (Monfort); 223-24 (Pace). Since the owners of these various facilities continue to operate them and to compete in the market, they presumably find it profitable to do so at prevailing industry prices.

There is no question, however, that better plant location, integration and product improvement have reduced some operating firms' operating costs and hence prices for the industry's output. Tr. 131-33 (Monfort). Mr. Monfort, plaintiff's chief executive officer and principal shareholder, testified that throughout this twenty year process, firms with higher operating costs have been caught in what he termed a "cost-price squeeze." *Id.* As the District Court observed, both parties agreed that this process has been the result of intense competition, and that the industry has been and remains highly competitive. App. 27a.

3. *The Section 7 Merits*: The District Court found two relevant markets: (1) a market for the purchase of fed cattle, and (2) a market for the sale of boxed beef. On the buying side, the District Court defined the relevant market to include those firms that currently purchase fed cattle in a twelve-state area, principally on the ground that low "margins" now make it uneconomical for cattle in that area to be sold elsewhere.[6] App. 50a.

[6] While the court also noted that there is a "relative lack of facilities for the slaughter and fabrication of fed cattle outside of the twelve-state region," it found that 26 percent of fed cattle are marketed outside of that area. App. 50a-51a.

The court gave no weight to evidence showing that if prices for fed cattle within that area fell below competitive levels by five percent, cattle feeders would begin to sell cattle to firms outside the twelve-state area, including firms with plants in immediately adjacent areas. *E.g.*, Def. Ex. LLLLLLL (Stout Testimony). The court similarly gave no weight to evidence indicating that such a price change would make it economical for firms slaughtering "non-fed" cattle or cows and bulls to slaughter fed cattle as well.[7] *E.g.*, Def. Ex. KKKKKKK at 9-18 (Neubauer Testimony).

On the selling side, the court held that even though "the ultimate consumer is probably unable to distinguish" between beef cuts produced by different fabrication facilities, the relevant market was a submarket consisting of boxed beef produced by independent and integrated fabricators. App. 54a, 56a-57a. The court gave no weight to evidence that a non-competitive price increase for boxed beef would increase production of boxed and non-boxed beef by independent fabricators as well as increase fabrication of carcasses by retailers and others. *E.g.*, Def. Ex. RRRRRRR at 14-15, 26 (Bouckaert Testimony). Without addressing Excel's contention that the District Court had used incorrect standards in defining the relevant markets, the Court of Appeals concluded that the District Court's definitions were not clearly erroneous. App. 15a.

On the basis of its market definitions, the District Court found that the acquisition would increase the four-

[7] In making these demonstrations, Excel used the five percent test of market participation set out in the U.S. Department of Justice's Merger Guidelines, 47 Fed. Reg. 28,492 (1982), *revised*, 49 Fed. Reg. 26,823 (1984). It did so not because the Guidelines in any way supersede or control the Section 7 analysis developed by the courts, but because they suggest a useful analytical tool for assessing the market forces constraining the ability of merging firms to behave non-competitively. *See* Baker & Blumenthal, "The 1982 Guidelines and Pre-Existing Law," 71 *Calif. L. Rev.* 311, 324 (1982).

firm concentration ratio from 52 percent to 57.5 percent in the buying market and from 53.8 percent to 59.5 percent in the selling market. App. 62a-63a. Excel's share of these markets would rise from 14.1 percent to 20.4 percent and from 13.3 percent to 20.4 percent, respectively. App. 13a. If the markets were defined to include those firms in the beef industry that would buy fed cattle or sell beef as a result of a five percent change in the price of those products, the four-firm concentration ratio would rise from 42.2 percent to 47.4 percent on the buying side, and from 38.7 to 43.4 percent on the selling side; Excel's respective shares of these markets would rise from 10.5 percent to 16.0 percent and from 9.1 percent to 13.8 percent. Def. Ex. MMMMMMM at Tables B, E.[8]

The District Court held that the concentration increases it had found established a *prima facie* case that competition would be substantially lessened.[9] App. 64a. The Court of Appeals did not address Excel's contention that anticompetitive consequences could not be inferred from shares in markets from which the court had excluded many beef firms who would constrain noncompetitve prices by increasing their own purchases or sales. It merely said that the District Court was not clearly erroneous. App. 15a.

The District Court found that this *prima facie* case was buttressed by the existence of high entry barriers. App. 64a-67a. The court concluded that the "low sales margins" that prevail in today's highly competitive beef

[8] When these market share figures are converted to the Herfindahl-Hirschman Index (HHI), the increase in concentration on the buying side would be from 699 to 815 and on the selling side from 605 to 691. *Id.* In its Merger Guidelines, the Justice Department states that it is "unlikely to challenge" a transaction in which the post-acquisition HHI is below 1000. 47 Fed. Reg. at 28,497.

[9] The court also gave weight to a trend of increasing concentration, even though the trend reflected the narrow markets it had adopted and, as Mr. Monfort himself testified, resulted from two decades of intense competition. App. 62a, 63a.

industry would discourage firms from spending $20 to $40 million to build a state-of-the-art integrated slaughter-fabrication plant and that there were few other suitable plants available. App. 65a. The court did not consider that there might be no incentive to build new plants now because of existing supplies of beef and merely competitive returns. Consequently, the court gave no weight to evidence that any non-competitive restriction of output would (1) create the incentive to build new plants by elevating returns, (2) induce expansion by the firms excluded from the defined markets, including additional fabrication by large retailers, and (3) induce the reopening of at least some of the plants that, the district court found, would be closed as a result of the acquisition's contribution to the "cost-price squeeze." *E.g.*, Def. Ex. NNNNNNN at 43-45 (Klass Testimony), Def. Ex. KKKKKKK at 8-9 (Neubauer Testimony). Again, the Court of Appeals ignored this evidence except to say that the District Court's findings were not clearly erroneous. App. 17a.

Finally, the District Court found that "[w]hile Monfort does not allege that IBP and Excel will in fact engage in predatory activities . . . [t]he likelihood of predatory pricing is heightened by the vast financial resources available to both Excel and IBP." App. 71a. Excel argued that the District Court erred in attributing competitive significance to the large assets of Cargill in the absence of any demonstration that this "deep pocket" was made any deeper by the acquisition, that those assets could be diverted to finance a predatory scheme, or indeed, that Excel was either able or likely to engage in predation. In affirming the District Court's findings, the Court of Appeals did not address these arguments except to say: "We would have no difficulty concluding that Cargill's financial resources would likely be used in an anticompetitive fashion if Excel acquired Spencer Beef and then engaged in a period of predatory pricing." App. 20a.

4. *Injury to Monfort Under Section 16.* Monfort's theory that the acquisition threatened it with injury was presented principally through the testimony of Mr. Monfort himself. Tr. 118-132. Mr. Monfort testified that the acquisition would actually lead to heightened competition—which he termed rivalry for market share—between Excel and IBP, supported by the financial resources of their parent firms. Mr. Monfort stated that this competitive rivalry would benefit cattle sellers with higher prices and benefit consumers with lower prices, but thereby harm slaughterers and fabricators, including Monfort, with lower profit margins. While Mr. Monfort acknowledged that such a "cost-price squeeze" has characterized the highly competitive beef industry for over twenty years, he predicted that this process would end with few surviving firms which could then artificially depress buying prices and elevate selling prices. But Mr. Monfort expressly disclaimed any contention that the acquisition would result in collusion or cooperation among industry participants. Tr. 130. Similarly, Monfort "[did] not contend that predatory practices would be engaged in by Excel or IBP" as a result of the acquisition. App. 32a. Instead, Monfort's theory of injury and its evidence purported to show only that Excel wanted to increase its sales as much as possible, and that the acquisition would help it to do so, both by giving it new capacity in a heavy cattle-feeding area and by enabling it to achieve multi-plant scale efficiencies superior to those of Monfort.

At the conclusion of Monfort's case, Excel moved for involuntary dismissal. Excel argued that Monfort's injury theory, which predicted lower profit margins resulting from heightened competition, contradicted its reliance on Section 7's horizontal merger standards, which rest on the link between high market concentration and the ability of firms in the market to raise profit margins through express collusion or "oligopoly pricing." Moreover, given Mr. Monfort's testimony that his company would be injured by the same competitive conduct

that has characterized the industry for the last twenty years, Excel observed that Monfort had shown no causal connection between the acquisition and Monfort's injury beyond the likely revival of Spencer's unused Nebraska plant by a highly efficient rival. Most importantly, Excel argued that by identifying heightened competition as the source of its harm, Monfort failed to show "antitrust injury" under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The District Court ruled otherwise, ultimately concluding that the acquisition threatened Monfort with harm sufficient to support relief under Section 16. Indeed, although the District Court acknowledged that Monfort had disclaimed any contention that Excel or IBP would engage in "predatory" behavior, it found such behavior likely because of the large assets of Excel's and IBP's parent companies.[10] App. 71a.

The Court of Appeals affirmed. It stated that Section 16, unlike Section 4, requires proof only of threatened injury and that, under *Brunswick*, there must be a causal link between the threatened injury and the violation. According to the Court of Appeals, therefore, the injury question in this case was whether "Excel's increased market power after the acquisition of Spencer would be a proximate cause of Monfort's threatened injury." App. 6a. The Court concluded that Monfort adequately had alleged and established that it was. The court characterized "the cost-price squeeze that Monfort claimed would follow the acquisition" as "a form of predatory pricing," rather than the consequence of on-going competition in the industry. App. 7a. It acknowledged that "[i]t is impossible to tell in advance" whether the accelerating cost-price squeeze Monfort predicted would, in fact, be predatory. App. 9a. But because Congress had intended Section 7 to be a prophylactic measure and because competitor challenges would help serve that end, the Court believed it sufficient that Monfort had alleged

[10] IBP is a subsidiary of Occidental Petroleum Corporation.

a theory of injury "logically related to harm caused by increased concentration of market power." App. 10a. Finally, the Court concluded that Monfort had shown a sufficient probability that the acquisition in fact could result in predation, because it would give Excel a 20.4 percent share in the markets the District Court defined. App. 13a. Accordingly, it stated, "[a]lthough Monfort will only suffer antitrust injury if Excel abuses its market power, the causal connection will exist if the ultimate injury materializes." *Id.*

REASONS FOR GRANTING THE WRIT

This case raises two important issues governing the administration of the Clayton Act's substantive and remedial provisions: first, whether a competitor seeking to prevent more intense competition can subject a merger to antitrust scrutiny under Clayton Act Section 16; and second, whether a scrutinizing court can mechanically apply numerical tests of legality without relating them and the other evidence presented to the purpose of Section 7.

This is one of a growing series of actions in which a competitor has invoked the horizontal merger standards of Section 7 and the remedial provisions of Section 16 in an effort to block or to delay a proposed merger or joint venture between two of its rivals.[11] All such cases present an inherent tension between the purpose of the antitrust laws—to preserve and promote competition—and competitors' incentive to prevent, if possible, efficiency-enhancing mergers and joint ventures that threaten to increase the competitiveness of the market in which

[11] *E.g., White Consolidated Industries, Inc. v. Whirlpool Corp.*, Nos. C85-472, C85-667, slip op. (N.D. Ohio July 3, 1985); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Company*, 600 F. Supp. 1326 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.), *cert. dismissed*, 105 S. Ct. 1155 (1985); *Chrysler Corp. v. General Motors Corp.*, No. 84-115 (D.D.C. dismissed April 12, 1985); *Pennzoil Co. v. Texaco, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,848 (N.D. Okla. Feb. 4, 1984), *aff'd*, 1984-1 Trade Cas. (CCH) ¶ 64,896 (10th Cir. Feb. 9, 1984).

they participate. Such misuse of the antitrust laws is addressed by the standing requirement, as set forth in this Court's *Brunswick* decision, that a plaintiff be genuinely threatened with injury and that such injury be of the kind the antitrust laws are intended to prevent. Obviously, increased competition may reduce a plaintiff's profits, but that is not an injury the antitrust laws are designed to prevent. And even if a merger or joint venture reduced competition in violation of the antitrust laws, a competitor would be benefitted, not harmed. And so it is that competitors fashion, and courts sometimes accept, implausible theories of injury and causation.

That is what happened here. The plaintiff acknowledged that its injury would flow from heightened competition; it specifically disclaimed any contention that this competition would become predatory. The courts below condemned the acquisition on the ground that it would increase concentration and thereby lead to "oligopoly pricing," but found that the plaintiff was injured as a result of increased competition that might become predatory. Such increased competition would, of course, benefit the public and serve, rather than offend, the policy of Section 7. But the Court of Appeals supposed that all increased competition involving a firm with large assets necessarily involves the danger of predation. The mischief of that ruling extends far beyond the present case, for it means that every horizontal merger or joint venture backed by "large" assets raises a sufficient threat of predation to allow a competitor to delay (and sometimes, thereby, to prevent) or block potentially beneficial activities.

Because the Court of Appeals' decision threatens seriously to undermine the antitrust laws' purposes by permitting competitors to invoke these laws to challenge efficiency-enhancing combinations, and because, unlike most such cases, this case comes to the Court after a trial on the merits in which the competitor has been given a full opportunity to develop its theory of injury, this Court should grant review in order to re-

solve an issue of general significance to the proper administration of the antitrust remedies.

The case also presents the important general question of the proper standards for applying Section 7 to horizontal mergers. To whatever extent it may be appropriate to simplify the inquiry, antitrust courts cannot altogether lose sight of the statutory mandate to assess the probability of anticompetitive effects. Here, the District Court resolutely excluded from the relevant markets many firms that occupy slightly different segments of the industry on the ground that intense competition provided a marginal advantage for those firms currently operating in the markets it defined. But of course it is the presence of those other firms that forces even the efficient to accept only competitive margins, and that prevents them from increasing those returns through cartels or "oligopoly pricing." Given such narrow market definitions, the lower courts must give attention to something more than the concentration numbers or superficially determined entry barriers. In resting on a not-clearly-erroneous fact-review standard, the Court of Appeals ignored the question of the appropriate standards to be used in evaluating the Section 7 inquiry and the teachings of this Court that require a more coherent inquiry into the likelihood of anticompetitive effects. That the Court of Appeals failed to understand that legal standards were involved demonstrates the need for further guidance from this Court on the proper approach for determining whether a horizontal merger violates Section 7.

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE THE KIND OF INJURY A COMPETITOR MUST ESTABLISH TO OBTAIN AN ANTITRUST INJUNCTION BLOCKING A MERGER OF TWO OF ITS RIVALS.

1. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court held that a plaintiff lacked standing to complain that its rival would be kept alive and competitive as a result of a merger. The Court

denied the plaintiff standing even though the challenged merger, which had been held unlawful, reduced the plaintiff's profits and therefore injured it in fact. The Court held that the plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489 (emphasis in original). Although allowing the plaintiff to sue in that case doubtless would have helped to deter unlawful mergers, the Court held that the antitrust laws precluded relief for a plaintiff injured by increased competition. It recognized not only that damages would be a windfall for the plaintiff, but also that granting relief for injuries that flow from heightened competition would be "inimical to the purposes of these laws . . . ." *Id.* at 488.

To be sure, standing may exist for injunctive purposes under Clayton Act Section 16 although it would be denied for damage purposes under Section 4, because injunctions do not involve windfalls, complex calculations or duplicative recoveries.[12] Similarly, injunctive actions do not require proof that feared damage has yet occurred. For example, a consumer is entitled to an injunction against a merger offending the prophylactic standards for prospective "oligopoly pricing" even though such anticompetitive effects have not occurred and may never occur.[13] But this greater hospitality for certain injunctive suits does not mean that a competitor can force the courts to decide the merits of a merger or joint venture that injures it only by increasing competition.[14]

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[12] *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

[13] This is the meaning of the portion of Professor Areeda's article cited by the Court of Appeals. App. 4a-5a n.1.

[14] Although the Court in *Brunswick* remanded the case for consideration of injunctive relief, it did so explicitly because the petitioner in *Brunswick* had not raised any question about such relief in its petition. 429 U.S. at 491.

Antitrust remedies, injunctions as well as damages, can distort the purposes of the antitrust laws. Indeed, injunctive actions have a greater potential for abuse. Undisciplined by the need to prove actual damages, plaintiffs can easily allege hypothetical and vague future threats of injury.[15] In all cases, therefore, *Brunswick* requires that the plaintiff's theory of injury to itself be consistent with its theory of an antitrust violation—that is, that its injury flow from that which makes the challenged conduct unlawful. Claiming that a merger violates Section 7 because it increases concentration (and thereby threatens to reduce price competition) but that it injures the plaintiff because it increases competition is doubly inconsistent: the claims predict inconsistent merger effects; in addition, the "injury" of increased competition does not flow from that which would make such a merger unlawful.

2. What makes horizontal mergers unlawful under Section 7, as noted above, is that increased concentration in certain market circumstances can lead to "oligopoly pricing." While such pricing might threaten injury to suppliers or customers, it does not threaten competitors, who would profit from lower buying prices or higher selling prices. For that reason, it may seem odd that competitors complain that a merger would have an anticompetitive effect from which they would prosper. Yet, a growing number do, and the explanation is likely to be found not in the law's purpose to guard against anticompetitive mergers or joint ventures, but in the plaintiff's purpose to abuse antitrust remedies at the expense of antitrust policy. As Professors Baumol & Ordover put it in discussing Chrysler's suit against a limited GM-Toyota joint venture to manufacture small cars in the U.S.:

[15] Furthermore, the modest cost of initiating and carrying such a suit through the preliminary injunctive stage makes the equity suit an attractive weapon for obstructing procompetitive moves by rivals.

> This sort of opposition is predictable and in a manner that is rather ironic it can signal clearly the likely effects of the joint venture. If the enterprise were in fact likely to acquire monopoly power and charge excessive prices, other U.S. auto firms undoubtedly would benefit from the resulting protective umbrella, which would enable them to raise their prices as well. If this is the probable outcome, then those rivals could be expected to view the joint venture with equanimity and silent acquiescence. But if the joint venture really is likely to introduce economies or improve product quality, it is sure to make life harder for the domestic rivals of the participants who will then have to run correspondingly faster in order to stand still.

Baumol & Ordover, "Use of Antitrust to Subvert Competition," 28 *J. L. & Econ.* 247, 256-57 (1985).

Because "competitors are more likely to sue . . . when there is an increase in competition than when there is a lessening of competition," and because litigation can be employed all too easily to harass and delay, the Justice Department has suggested that competitors' claims of injury must be "subjected to searching scrutiny" even at the pleading stage.[16] This is not to say that competitors never have standing to challenge horizontal mergers by their rivals (a position the lower courts incorrectly attributed to Excel below). App. 10a, 39a. A competitor genuinely threatened with predation would be threatened with the type of loss that the antitrust laws are designed to prevent. At a minimum, however, such a competitor must show that the necessary conditions for successful predation exist.

3. Not only was no such showing made in this case, but the Court of Appeals imagined a universal danger of predation that subjects every horizontal merger and

[16] Memorandum of the United States of America as *Amicus Curiae* in Support of Defendants' Motion to Dismiss the Complaint for Lack of Standing, *Chrysler Corp. v. General Motors Corp.*, Civil Action No. 84-115, D.D.C., Feb. 13, 1984.

joint venture by firms with "large" assets to challenge by competitors. Monfort's complaint did not allege that Excel's acquisition of Spencer would enable it to engage in predatory conduct. Indeed, as the District Court acknowledged, Monfort's arguments and testimony expressly disclaimed any contention that predation would result from the challenged acquisition. App. 32a, 71a. Instead, Monfort's injury arguments asserted only that the acquisition would accelerate the "cost-price squeeze" that had become increasingly severe in the industry over the last two decades and that threatened to induce some less efficient competitors to leave the market. Tr. 131-33 (Monfort). But Monfort flatly admitted that the cost-price squeeze was the consequence of competition, not of predation on the part of the industry's leaders. *Id.* In fact, to the extent that Monfort related its fear of injury to the characteristics of the acquisition at all, it asserted only that the acquisition might create, for Excel, multiplant scale efficiencies that Monfort itself did not have.[17] Pl. Ex. 74 at 43 (Pace Testimony). Monfort also contended that the large resources of Excel's corporate parent would enable it to survive the cost-price squeeze better than Monfort or smaller competitors. Tr. 118-19 (Monfort). But that would be so whether Excel acquired Spencer or not.

In addressing the injury issue, the Court of Appeals simply finessed the critical inquiry, both by characterizing the threatened intensification of the "cost-price squeeze" Monfort described as a "form of predation" and by holding that the possibility of such predation was established merely by an increase in Excel's market share and the "deep pocket" of Excel's corporate parent. App. 7a, 12a, 20a. Courts and commentators have recognized the vital necessity of distinguishing between price reductions that are the expected and desirable result of the competitive process and those that are used as a means

[17] Neither the District Court nor the Court of Appeals mentioned this contention in their opinions.

to drive rivals from the market and thus secure a monopoly position. *E.g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); *MCI Communications v. AT&T Co.*, 708 F.2d 1081, 1113 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The First Circuit observed in *Barry Wright*:

> The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals.

724 F.2d at 231.[18] Indeed, as Professors Areeda and Turner have noted, this Court reversed the Third Circuit's decision in *Brunswick* in large part because the Court of Appeals "confuse[d] predation with competition." II P. Areeda & D. Turner, *Antitrust Law* ¶ 346 (1978).

The Court of Appeals recognized this problem, but could perceive no way of distinguishing between predatory and competitive pricing in advance of its occurrence. App. 9a. Moreover, it found no need to employ such a distinction given the prophylactic purposes of Section 16. App. 9a-10a, 12a. In effect, the Court of Appeals held, as a matter of law, that competitors can establish antitrust injury merely by asserting that an acquisition by a firm with large resources threatens to lead to price reductions and that these price reductions *might* be predatory. And this is so, under the Court's holding, even when the necessary conditions for successful predation do not exist.

In fact, nothing in the record of this case supports a finding that the acquisition would give Excel the ability

[18] Thus, a statement by an Excel employee, such as the one highlighted by the District Court, that "[w]e must gain shares from the leader [IBP] and inhibit the smaller processor's share" (App. 70a-71a) does not even tend to indicate anticompetitive intent. Mr. Monfort made this point succinctly. In response to the question whether he would like to increase Monfort's present share of the market, he replied: "Yes, I am normal." Tr. 125.

to engage in predatory conduct. Of course, a strategy of predation is possible only if the predator has the resources necessary to survive the loss of profits in the price-cutting period. But the large resources of the acquiring firm—resources necessary for its overall business activities—are not, by themselves, sufficient for predation. Indeed, predation is not even theoretically possible in the absence of at least two other conditions. First, the predator must control so substantial a share of the industry's capacity as to enable it to increase supply dramatically and thereby lower general market price levels enough to force rivals to leave the market. Without that degree of market share, even giving away existing output cannot affect *market* price levels, and consequently puts no pressure on rivals at all. *See, e.g., Barry Wright Corp.*, 724 F.2d at 231; *MCI Communications*, 708 F.2d at 1112; Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harv. L. Rev.* 697, 698 (1975) (hereinafter cited as "Predatory Pricing"). Here, the increases in capacity shares the acquisition would afford to Excel—from 14.1 to 20.4 percent and from 13.3 to 20.4 percent even in the narrow markets the District Court defined—are far below the levels that even arguably could enable Excel predatorily to raise input prices or lower selling prices.[19]

Second, predation cannot succeed, and thus cannot be expected to occur, unless the predator can exploit the monopoly gained from destroying most of its rivals and thereby recoup more than it lost during the predatory period. It cannot do so unless it can (1) prevent firms

[19] The courts and commentators uniformly assume that monopoly-level market shares are necessary to engage in successful predation. For example, Professors Areeda and Turner state that substantial market power may be presumed when, *inter alia*, "[d]efendant's share of a market has exceeded 75 percent for the five years preceding the complaint." III P. Areeda & D. Turner, *Antitrust Law*, ¶ 803 (1978). *See also Barry Wright Corp.*, 724 F.2d 227 (no predation; market shares increased from 47 to 94 percent during the four year period in question); *MCI Communications*, 708 F.2d 1081 (no predation; market share in excess of 90 percent).

in immediately adjacent portions of the industry from expanding sales and (2) prevent entry into its particular segment of the industry. *E.g., Barry Wright Corp.*, 724 F.2d at 231; Areeda & Turner, "Predatory Pricing," 88 *Harv. L. Rev.* at 688-89. Again, this two-part precondition is not met here. The District Court thought the first part of the requirement irrelevant. As for the second, it found that new entrants faced high entry barriers because of the capital costs of new integrated plants and the lack of available existing plants. However, those barriers, even if present, could not prevent existing market participants and other firms from re-opening plants that had closed during the price-cutting period. *See, e.g., id.* at 698. In short, neither Monfort's evidence nor, indeed, its claims support the Court of Appeals' conclusion that a possibility of predation—rather than enhanced competition—was the source of Monfort's harm and adequately satisfied the *Brunswick* test.

4. The Court of Appeals' judgment ultimately rested on its view that competitors' actions are useful in preventing acquisitions that violate Section 7, and that the risk of abuse is tolerable because only those acquisitions actually violating Section 7 would be enjoined. App. 9a-10a, 12a. The Court of Appeals wrongly discounted the danger competitors' suits present. First, granting standing to competitors on the basis of the assumption that predation lurks in virtually every acquisition involving firms with large resources empties Section 16's requirement of "threatened loss" of almost all meaning. Second, ultimately holding a merger or joint venture lawful cannot prevent spurious suits by competitors to delay or deter arrangements that would intensify competition. Third, even the wisest, irreversible judicial assessment of mergers and joint ventures under Section 7 is a guess, without pretense of accuracy. The analytical tools available are far too imprecise to allow anything approaching complete confidence that correct results are regularly

reached. The inevitable imprecision is the necessary consequence of the task Section 7 entrusts to the courts. But this imprecision removes any assurance that only truly anticompetitive acquisitions will ultimately be enjoined. Those contemplating procompetitive transactions will have to recognize that the very benefits of the transaction for society will generate opposition by competitors, possible suits, costs and delays, and a risk that the transaction will be prevented. Fourth, the antitrust laws provide ample enforcement machinery without creating standing where it does not exist. In this case, as in all significant horizontal merger cases, the Government enforcement agencies had a full opportunity to review the competitive effects of the acquisition and to bring timely action if they had found it appropriate. Customers and suppliers can bring private actions under Section 16 against acquisitions that threaten to create market power. Indeed, if market circumstances genuinely threaten predation, competitor suits may be appropriate. Finally, imprecise reasoning concerning competitor standing contributes to (and may flow from) a flawed substantive analysis of the Section 7 inquiry.

5. This is a particularly appropriate case for this Court's review of these increasingly important issues of antitrust policy. The costs and delays of litigation frequently will induce merging parties or joint venturers to abandon the contemplated transaction, particularly if a preliminary injunction has issued. *E.g.*, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).[20] Even worse, they may be induced to remove the competitor's objections by modifying the transaction in ways that reduce the efficiency-enhancing features to which the competitor objects. Few cases involving these issues, therefore, are

[20] *See also* ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Enforcement of Section 7 of the Clayton Act* (1977) 33-34 (analysis of thirty-three reported cases indicates that in every case but one, where preliminary relief was granted, the offer was withdrawn and no full trial on the merits was held).

likely to survive to review by this Court, and of those, fewer still will present the full record of the competitor's injury claim as this case does. Because of these factors and because of the serious threat posed by competitor actions to the fundamental purposes of the antitrust laws, the Court should review the Court of Appeals decision.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FAILURE OF THE COURTS BELOW TO EMPLOY STANDARDS FOR DEFINING MARKETS AND EVALUATING THE COMPETITIVE EFFECTS OF A PROPOSED ACQUISITION THAT ARE CONSISTENT WITH THE PURPOSE OF CLAYTON ACT § 7 AND THE CONTROLLING DECISIONS OF THIS COURT.

1. Section 7 forbids mergers whose probable effect "may be substantially to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Although easily applied to permit a merger of two small firms in a perfectly competitive market, or to condemn a merger creating a monopoly, predicting the future consequences of other mergers is very difficult. If feasible, an inquiry into all the factors affecting future competition is called for, as this Court held in *Brown Shoe*. 370 U.S. at 321-22. But because the prediction is so elusive, aggregations involving very large market shares were presumed anticompetitive in *United States v. Philadelphia National Bank*, 374 U.S. 321, 364 (1963). As this Court has recognized, however, market share statistics "can be unreliable indicators of actual market behavior," *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974), and may give "an inaccurate account of the acquisition's probable effects on competition." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975). The degree to which market shares reflect the merging parties' competitive significance necessarily depends on the quality of the market definition, ease of entry, and sometimes on other factors as well, as this Court recognized in *United States v. General Dy-*

namics Corp., 415 U.S. 486, 501-04 (1974).[21] Exactly how wide-ranging the Section 7 inquiry should be has not been, and probably cannot be, stated with precision. Some types of presumptions, rules of thumb, or short-cuts may well be indispensable for the efficient administration of the law. However, efforts toward simplified administration must always remain in touch with the statutory purpose. That is the essential teaching of *General Dynamics*—a lesson that was lost sight of by both lower courts in the present case.

Following this Court's recent Section 7 decisions, the lower federal courts generally have recognized that the elements of the Section 7 inquiry must be directed to the probability of future "oligopoly pricing." Specifically, the courts have recognized that competition from firms that do not participate in certain industry segments at prevailing prices may limit substantially any attempt by the merged firm to raise prices in those industry segments. Some courts have accounted for this potential competition by defining markets to delineate the "area of effective competition" the merging firms confront—*i.e.*, to encompass the various producers to which customers could turn or whose responses could constrain any ability on the part of the merging firm and its immediate rivals to engage in "oligopoly pricing."[22] Other courts have accounted for such competition, especially when they have chosen to define markets narrowly, by considering the ease with which entry can occur, since the merged firm and its immediate rivals would be able to engage in

[21] In *General Dynamics*, the Court held that existing, committed coal reserves properly were excluded from the calculation of market shares of coal producers, since those reserves were not available for sale and thus were irrelevant to the assessment of future competitive performance. 415 U.S. at 501-04.

[22] *E.g.*, *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366-68 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 916 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

"oligopoly pricing" only if barriers prevent the entry of new firms, or of existing firms in immediately adjacent industry segments, that would be attracted by the market's supra-competitive profits.[23] The courts below failed to use either of these approaches. As a result, the legal standards they employed conflict with the teachings of this Court, of other federal courts, and with the purpose of Section 7.

2. As noted at the outset of this petition, the explicit purpose of Section 7 is to prevent market structure changes that probably will lead to "oligopoly pricing." Economic science does not provide any reliable "peril-point" of concentration beyond which such pricing is likely to occur. Indeed, it cannot, for that point will vary depending on other industry circumstances.[24] Nevertheless, some rules of thumb have developed emphasizing various degrees of concentration as measured by market shares. *E.g.*, *Philadelphia National Bank*, 374 U.S. at 364 (merger resulting in firm with 30% of the market held unlawful). *See also* IV P. Areeda & D. Turner *Antitrust Law* ¶ 909b (1980). Because market definition is the first step in arriving at such shares, it has naturally become the source of much dispute. Naturally also, much discretion must be left to the trial courts in defining markets. Petitioners do not ask this Court to define the correct markets. Rather, we ask this Court to consider the principles that should guide market definition—a task that the Court of Appeals refused to undertake after misconceiving it as a review of the factual

[23] *E.g.*, *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984); *United States v. Calmar, Inc.*, 1985-1 *Trade Cas.* (CCH) ¶ 66,588 (D.N.J. 1985). *See also Echlin Manufacturing Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,268 (FTC June 28, 1985).

[24] *See, e.g.*, F. M. Scherer, *Industrial Market Structure and Economic Performance* 169-229 (2d ed. 1980) (effective oligopolistic coordination depends on a variety of factors, including the number and size distribution of sellers, product heterogeneity, frequency and size of purchases, and industry cost structure).

determinations of the District Court, which the Court of Appeals found were not clearly erroneous.

3. Cargill and Excel do not dispute the key findings of fact that underlie the District Court's market definitions—for example, that most fed cattle are now sold in the twelve-state area, that most slaughterers of "non-fed" (that is, grass fed) cattle do not now purchase and slaughter "fed" cattle, or that certain fabricators do not now prepare and sell "boxed beef." App. 51a, 56a, 58a. At present intensely competitive prices—as conceded by all parties and found by the District Court (App. 27a)—profit margins are so competitively tight as to make it relatively uneconomical to purchase fed cattle outside of the twelve-state area, to slaughter fed cattle at less efficient slaughterhouses, or to fabricate boxed beef at less efficient fabrication plants. App. 50a, 56a, 58a. For some purposes, therefore, it might be sensible to define the markets as the lower courts did.

However, it should be obvious that *if* the "markets" the District Court defined began to perform non-competitively as a result of increased concentration within them, the small price-cost differences separating those segments of the industry from immediately adjacent segments would not insulate the defined "markets" from competition. If fed cattle buying prices were depressed because firms artificially reduced their volume of purchases, more fed cattle would be shipped out of the twelve-state area; in addition, slaughterers of non-fed cattle would slaughter fed cattle as well. If selling prices of boxed beef were artificially enhanced, large retail chains would fabricate more boxed beef themselves or simply handle more non-boxed beef.

Of course, it is conceivable that existing buyers of fed cattle or existing independent and integrated fabricators of boxed beef could reap excess profits up to some point before being constrained by other beef competition, but the District Court did not so find. It simply regarded the competitive response to non-competitive pricing in

the narrow markets it defined as irrelevant. That is a fundamental error of principle, totally at odds with the purpose of the inquiry under Section 7. That error deprived the trial court's market and concentration shares of any predictive significance.[25] In declaring the lower court's conclusions not clearly erroneous, the Court of Appeals incorporated this fundamental flaw.

4. In finding that entry barriers were high, and that such a finding was not clearly erroneous, the lower courts made the same error of principle. They recognized that entry was relevant but, forgetting the reason for its relevance, they never asked "entry into what" or considered what factors determine entry. The relevant "entry" is of those firms not now buying or selling a specified product who would find it profitable to do so (1) at present competitive levels of profits and (2) at higher levels. The lower courts considered the latter irrelevant although the latter prevents existing firms from attaining the non-competitive performance that Section 7 is designed to prevent.

The District Court found that new entry into buying fed cattle or fabricating boxed beef faced "formidable barriers" because (1) "low profit margins in the beef industry" would not induce expenditures of $20 to $40 million to build a modern, state-of-the-art integrated slaughter-fabrication plant and (2) few alternative plants are available. App. 65a. However, such a finding does not tell whether entry would be likely if firms in the narrowly defined markets restricted output below currently competitive levels in an effort to depress buying prices or elevate selling prices. In that event—the event whose prospect offends Section 7—profit margins would cease to be low, with two readily forseeable con-

[25] "A market definition artificially restricted to existing firms competing at one moment may yield market share statistics that are not an accurate proxy for market power when substantial potential competition able to respond quickly to price increases exists." *Waste Management*, 743 F.2d at 982.

sequences, both of which were supported by evidence: new entrants would find it profitable to build modern integrated plants, and firms not now in the narrow markets defined below would find it profitable to enter them with modest improvement or expansion of their existing facilities. The lower courts resolutely regarded these matters as irrelevant.

The lower courts also refused to consider the expansion potential of smaller firms now in the narrow markets. Without considering such expansion, without considering the ability of entry to constrain non-competitive performance, and without considering the response (to depressed cattle prices or elevated boxed beef prices) of other cattle buyers or other beef sellers or buyers, the market shares and concentration data relied upon in this case do not indicate any probability that competition would be substantially lessened. Indeed, in trying to establish injury to itself, the plaintiff contended that the immediate consequence of the acquisition would be intensified rather than reduced competition.

As the authorities discussed above demonstrate, the constraining responses to non-competitive pricing can be taken into account in defining the relevant market, as some courts do, or in appraising the significance of the share or concentration numbers, as other courts do. But this Court should consider whether the courts administering Section 7 may resolutely refuse even to ask what would probably happen to competition in the industry segments it defined as the relevant markets if intensely competitive prices within those segments somehow became non-competitive.

5. Even the benefit the Court of Appeals claimed for its approach is an illusion. The court held that the District Court was right to simplify the inquiry by confining its decision to market share statistics plus only "limited information" about the markets. App. 18a. But such simplication only submerges the realities of industry structure and performance beneath a superficial and

mechanical exercise of defining markets and calculating shares.

Sometimes markets are relatively clear; sometimes industry structure allows a reasonable inference that non-competitive price coordination will arise or be reinforced. But such an inference cannot reasonably be drawn here from the shares of a narrowly defined submarket, which is itself intensely competitive, within a highly competitive industry. Even apart from the many other factors affecting market performance here,[26] the prediction mandated by Section 7 cannot be made by ignoring the consequences of any attempt at non-competitive pricing.[27]

However desirable it may be to simplify the Section 7 inquiry, it cannot be simplified to the point of divorcing the inquiry from the purpose of the statute. The lower

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[26] The evidence introduced by both plaintiff and defendants at trial demonstrated, for example, that the existence of large-scale, sophisticated purchasers, armed with (1) the incentive to detect non-competitive conduct, (2) the ability to switch their purchases among various suppliers, and (3) the ability to integrate backward themselves would make non-competitive behavior difficult, if not impossible, to sustain. *E.g.*, Pl. Ex. 74 at 6, 9 (Pace Testimony); Def. Ex. NNNNNNN at 52-54 (Klass Testimony). Similarly, the evidence showed that the significant costs of capacity underutilization and the perishability of the product would make oligopolistic output reductions very costly to achieve. *E.g.*, Pl. Ex. 24 at 1 (Excel LRPC Report, January 24, 1983), Def. Ex. NNNNNNN at 54-55 (Klass Testimony).

[27] The lower courts also asserted that the large resources of Cargill were somehow relevant—apparently to the possibility of predation as discussed in Part I. App. 19a-20a; 67a-69a. Neither court said anything more. *Id.* Large assets, however, have nothing to do with whether the merging firms themselves have sufficient control over production to monopolize the industry or whether express collusion or oligopoly pricing is made possible (or reinforced) by a horizontal merger. *See, e.g., Beatrice Foods*, 86 F.T.C. 1 (1975), *aff'd*, 540 F.2d 303 (7th Cir. 1976); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, V P. Areeda & D. Turner, *Antitrust Law* ¶ 1135 (1980).

courts' error conflicts with the teachings of this Court and the decisions of other federal courts. That error is so fundamental that it creates the need for this Court's review.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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September 19, 1985

APPENDIX

(2)

85-473

No. —

In The
Supreme Court of the United States

October Term, 1985

Cargill, Inc. and Excel Corporation,
Petitioners,

v.

Monfort of Colorado, Inc.,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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* Petitioners' Statement Pursuant to Rule 28.1 is submitted separately from the petition, together with a motion to allow submission of the Statement under seal.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2588
84-1305

MONFORT OF COLORADO, INC.,
Plaintiff-Appellee,

v.

CARGILL, INC. and EXCEL CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 83-F-1318)

[Filed April 23, 1985]

Robert F. Hanley (Ronald G. Carr, Alan K. Palmer, and W. Stephen Smith with him on the briefs), of Morrison & Foerster, Denver, Colorado, for Defendants-Appellants.

William C. McClearn (James E. Hartley and Marcy G. Glenn with him on the briefs) of Holland & Hart, Denver, Colorado, for Plaintiff-Appellee.

Before LOGAN, BREITENSTEIN, and McWILLIAMS, Circuit Judges.

LOGAN, Circuit Judge.

Monfort of Colorado, Inc. has brought this private antitrust action seeking to enjoin its competitor, Excel Corporation, a wholly owned subsidiary of Cargill, Inc. (hereinafter defendants or Excel), from acquiring another competitor, Spencer Beef Division of Land O'Lakes, Inc. Defendants appeal the district court's grant of a permanent injunction prohibiting Excel from acquiring Spencer Beef. *See Monfort of Colorado, Inc. v. Cargill, Inc.*, 591 F. Supp. 683, 710-11 (D. Colo. 1983). Defendants also appeal an enforcement order that the district court issued after defendants acquired one of Spencer Beef's plants in spite of the original injunction.

Plaintiff Monfort packs and fabricates beef at plants in Greeley, Colorado, and Grand Island, Nebraska. It is the fifth largest beef packer in the country. Defendants Cargill and Excel operate four integrated beef packing and fabrication plants in Kansas, Missouri, and Texas, a slaughter facility in Nebraska, and a fabrication plant in Kansas. Excel is the second largest beef packer in the United States. Its parent company operates subsidiaries in at least thirty-five countries.

Spencer Beef, which Excel seeks to acquire, is a division of the agricultural cooperative Land O'Lakes, Inc. and was the third largest beef packer in the United States when all of its plants in Spencer, Iowa, Oakland, Iowa, and Schuyler, Nebraska were operating. Spencer's Schuyler plant, which has been closed for more than two years, 591 F. Supp. at 689, is approximately sixty miles from Monfort's Grand Island plant. Spencer and Land O'Lakes are not parties to this litigation, although at one time they sought to intervene. *See Monfort of Colorado, Inc. v. Cargill, Inc.*, No. 84-1060 (10th Cir. Aug. 8, 1984) (appeal dismissed).

Monfort brought this suit in July 1983, seeking an injunction under section 16 of the Clayton Act, 15 U.S.C. § 26. It claimed that Excel's proposed acquisition of Spencer Beef would violate section 7 of the Clayton Act, 15 U.S.C. § 18, and section 1 of the Sherman Act, 15 U.S.C. § 1. This case presents the significant threshold issue of whether a company has standing to seek a section 16 injunction against its competitor's horizontal acquisition of a competing firm. It also presents questions concerning the propriety of the proposed acquisition under section 7, as well as the propriety of a partial acquisition of assets once a district court has enjoined the originally proposed transaction. We find that Monfort has antitrust standing, that the district court properly granted Monfort's request for an injunction, and that Excel's subsequent acquisition of a Spencer Beef plant violated this injunction. Therefore, we affirm the district court's judgments.

I

A

The threshold issue is whether Monfort has antitrust standing to challenge this merger. The landmark case governing analysis of antitrust standing is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), with its oft-quoted holding that "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489 (emphasis in original). *Brunswick* involved a claim for damages under section 4 of the Clayton Act; the Court there was particularly concerned with section 4's specific reference to injury: suit may be brought only by persons "who shall be injured." *See* 429 U.S. at 485-86. In Section 16 injunction cases, however, the courts do not require proof of actual injury because they need not calculate damages. Instead, they follow section 16's command to apply equitable standards for an injunction. *See, e.g., Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 407-08 (1st Cir. 1985); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357-58 (6th Cir. 1985), *cert. dismissed*, 53

U.S.L.W. 3620 (U.S. Feb. 14, 1985). The Supreme Court has held that because section 16 does not require actual injury it does not foreclose antitrust claims for which the injury has yet to occur. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

The antitrust claims in this case and in *Brunswick* involve both a remedial statute, section 16 or section 4, and a substantive statute defining the antitrust violation, section 7 of the Clayton Act. To obtain antitrust standing a plaintiff must meet the threshold requirements of both the remedial and substantive statutes. In *Brunswick* the Court observed that to recover section 4 damages for a section 7 violation a plaintiff must prove more than that defendant violated section 7. *See* 429 U.S. at 486. The same is true in a section 16 case, but the threshold of proof beyond the section 7 violation remains lower than it would be in a section 4 case. *See Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association*, 707 F.2d 1147, 1151 (10th Cir. 1983), *aff'd*, —— U.S. ——, 52 U.S.L.W. 4928 (U.S. June 27, 1984) (certiorari not sought on standing issue, *id.* at 4931 n.14); *see also Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210 (3d Cir. 1980). The practical result of this distinction is that in a section 16 case, because actual injury need not be shown, it is much easier for a plaintiff to show causation of its hypothetical antitrust injury by a putative antitrust violation. The Court in *Brunswick* recognized this distinction by not foreclosing plaintiffs in that case from seeking an injunction even though they lacked standing to seek damages.[1] *See* 429 U.S. at 491.

[1] We also note that Professor Areeda's law review article which apparently influenced much of the *Brunswick* analysis, *see, e.g.*, 429 U.S. at 487 n.11, recognized potential differences between antitrust standing analysis in claims for section 4 damages and claims for a section 16 injunction. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1139 (1976) (denying standing to section 4 plaintiffs "does not leave society remediless, however, as both private equitable relief and government action are available."); *see also* II P. Areeda & D. Turner, *Antitrust Law* ¶ 335e at 176 (1978) (noting important differences between section 4 damage actions and section 16 injunctive actions); L. Sullivan, *Antitrust* § 247 at 772 (1977) (noting lower threshold for section 16 actions because loss must only be threatened).

Therefore, when we consider *Brunswick*'s requirements for antitrust standing in this section 16 case, the Court's concerns with restricting section 4 cases, in part because of the peculiar risks of unrestrained treble damages claims, are of little consequence. *See, e.g., id.* at 485-88; *see also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 543-45 (1983) (discussing problems of duplicate recovery and complex apportionment of awards in section 4 cases); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473-75, 475 n.11 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (Clayton Act section 4 was intended to compensate victims of antitrust injury as well as to deter antitrust violations). Thus most of the Supreme Court and lower court cases that have addressed antitrust standing are distinguishable in a section 16 case because they involve treble damages and section 4's actual injury requirement.

In a section 16 case, *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation. If a plaintiff surmounts this causation hurdle it has standing to seek an injunction. Of course it still must satisfy section 16's requirements in order to obtain the injunction,[2] and in

[2] Section 16 specifically refers to common law standards for equitable relief. Excel has not specifically objected to the district court's finding that Monfort satisfied section 16's requirements for impending harm. *See* 591 F. Supp. at 709-10. Excel does object to some of the fact findings supporting the injunction and we dispose of those objections in Section II, *infra*. But Monfort's

the course of doing so it will have to prove a substantive antitrust violation such as the section 7 violation alleged here. The Supreme Court has said that this causation inquiry is like proximate cause analysis, *see Blue Shield*, 457 U.S. at 477; *Associated General Contractors*, 459 U.S. at 535-36. To decide whether Monfort has antitrust standing, we now consider whether Excel's increased market power after acquisition of Spencer Beef would be a proximate cause of Monfort's threatened injury.[3]

B

Excel and Monfort are direct horizontal competitors in the beef packing and fabricating business. Excel contends that competitors generally should be denied standing to challenge a merger because they actually benefit from any increased concentration in the industry. Excel argues, in effect, that Monfort would have fewer com-

allegations in its brief that it satisfied the requirements of section 16 are not answered or specifically denied in Excel's reply brief.

The Sixth Circuit applied section 16 standards to determine the propriety of a preliminary injunction in a competitor's challenge to a merger when it, like we, concluded that the competitor had standing because causation between the antitrust violation and the injury had been shown. *See Christian Schmidt Brewing Co.*, 753 F.2d at 1356, 1358. We think it is more productive for courts to focus their efforts on section 16's judicially ascertainable prerequisites to relief rather than be forced to delve into the merits to determine standing, a task that should be a threshold inquiry.

[3] One possible argument against Monfort having antitrust standing here is that the harm it may suffer from the reopening of Spencer Beef's Schuyler plant would occur regardless of which parent company reopened the plant. This, of course, was the basis for the Supreme Court's dismissal of the *Brunswick* claims. *See* 429 U.S. at 487. Monfort's alleged harm goes beyond the rejuvenation of the Schuyler plant, however. Monfort is concerned with potential predatory operation of all Spencer Beef and Excel plants, all but one of which are currently in use. It is claiming that additional market power would give these plants coercive strength that they previously lacked even when operating at full capacity.

petitors if the proposed merger were consummated and thus would accrue some of the advantages of oligopoly rather than suffer any antitrust injury. Excel also suggests that even if Monfort suffers from the merger it would only be suffering the effects of competition; it alludes to the statement, recently reaffirmed in *Brunswick*, that the "antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick*, 429 U.S. at 488 (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).[4]

In support of its theory that the acquisition may injure competition, Monfort does not claim that consumers of beef will immediately be hurt by higher beef prices. Indeed, Monfort would surely benefit if beef prices rose following Excel's acquisition. Instead Monfort claims that Excel will be able to engage in what we consider to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers. The resulting cost-price squeeze will, according to Monfort, reduce its profit margin and drive it and other companies out of business. Once that occurs Excel will then use its market power to charge monopoly prices for its beef. Thus, according to Monfort, the harm to competition will follow an intense, but ersatz, period of competition during which Excel will increase its market share. Although Monfort does not discuss less drastic results, it is also possible that such a pricing strategy could enable Excel to demonstrate its price leadership to its competitors and force them to follow its artificially high boxed beef prices. Such a result would probably help

[4] This talismanic language is unhelpful here as it readily appears that Monfort's harm as a competitor may be a subset of the overall harm to competition. We are not prepared to dismiss every case that presents harm to specific competitors. Indeed, we are looking for such harm as part of our standing inquiry.

Monfort but hurt competition by promoting tacit collusion. Monfort contends that Excel would be better able to engage in such a sustained period of predatory pricing if it possessed the additional market power that would come with increased market share following acquisition of Spencer Beef. Thus it claims that the harm to competition, as well as the injury it will suffer as a competitor, is directly tied to the putative Clayton Act section 7 violation.

Excel does not deny that such a pricing strategy could occur; instead it advances an economic theory, using Chicago School concepts, *cf.* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 266 (1981) ("it is exceedingly hard to distinguish 'predatory' strategies from ordinary competition."), which characterizes such pricing as pure competition. According to this theory, Excel would simply be using its superior skill, foresight and industry to increase its market share and drive inefficient competitors like Monfort from the marketplace.

Legal scholars have vigorously debated the nature and very existence of predatory pricing. *See, e.g.*, Easterbrook, *supra* (reviewing some of the recent theories and proposing own theory that if predation does occur, its harms are not worth policing). But the courts have continued to find that predatory pricing, when proved, violates the antitrust laws. *See, e.g., MCI Communications v. AT&T*, 708 F.2d 1081, 1112-13 (7th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 234 (1983) (recognizing potential violation based on predatory pricing but finding insufficient evidence in case under consideration); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031-38 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982) (establishing rules for predatory pricing cases). *Brunswick* itself mentions predatory pricing as an evil the antitrust laws are intended to prevent. 429 U.S. at 489 n.14. Thus, we too decline to

embrace the theory that predatory pricing is just true competition. Respected commentators do not agree on even the fundamental aspects of the evils of oligopoly, much less the implications of predatory pricing. *See, e.g.*, II P. Areeda & D. Turner, *Antitrust Law* ¶ 404 at 272-79 (1978); R. Bork, *The Antitrust Paradox*, 178-91 (1978); R. Posner, *Antitrust Law: An Economic Perspective* 42-55 (1976).

Our problem is made more difficult, however, because the predation in this case is only threatened. We lack the ordinary guideposts such as marginal cost and average variable cost that might otherwise highlight a violation. Whether Monfort would suffer any injury from Excel's acquisition depends on how long Excel engaged in predatory pricing. If Excel did so only for a short time and did not drive Monfort out of business, Monfort would probably benefit from the likely decrease in price competition caused by Excel's price leadership. But if Excel engaged in sustained predatory pricing Monfort and other companies could be driven out of business, the beef packing industry would become more concentrated, and it is likely that competition would be substantially lessened because of tacit collusion. Congress intended Section 7 of the Clayton Act to prevent either circumstances; yet Monfort would only be harmed by sustained predatory pricing.[5] It is impossible to tell in advance of the acquisition which situation would occur, if either.

Monfort has alleged a plausible theory for how it may be injured by Excel's putative section 7 violation. It is commonplace that Congress intended section 7 of the

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[5] Monfort could argue that it would be hurt by Excel's price leadership even if it continues in business because it would be coerced from vigorously competing in a way that might expand its own market share. We are satisfied, however, that Monfort would reap substantial profits at least in the short term from an interdependent price structure because it and other firms could charge supracompetitive prices.

Clayton Act as "a prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . .'" *Brunswick*, 429 U.S. at 485 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957)). Congress feared concentration of economic power, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 (1962), and provided public and private remedies for challenging mergers that would increase industry concentration and diminish competition. Monfort's theory of injury is logically related to harm caused by increased concentration of economic power.

We recognize that special concerns do arise when competitors have the power to challenge each other's corporate acquisitions. Competitors may invoke the procompetitive goals of antitrust statutes yet intend to bring about anticompetitive results. For example, a company may want to block its competitor's efficient acquisition despite FTC or Justice Department preclearance simply because the challenging company fears it will not be able to match its competitor's newly acquired efficiencies such as economies of scale. Nevertheless, Congress created a private remedy for enforcing section 7 and hence apparently did not think that all private challenges would be spurious.

Excel contends, in effect, that all private challenges by competitors should be forbidden. Yet even the Justice Department amicus brief, filed in an unrelated suit, that it cites for support does not advocate this drastic position.[6] The Justice Department specifically said that it was "not suggesting that competitors never have standing to seek injunctive relief against mergers or joint ventures involving their rivals." Appellants' Brief, Appendix at 14. It merely asked the court in that case to engage in searching scrutiny of private plaintiffs' allegations of injury, aware that a government entity has authority to sue if the acquisition offends the public interest.

[6] The Justice Department filed its amicus brief in support of General Motors' motion to dismiss the complaint for lack of standing in *Chrysler Corp. v. General Motors Corp.*, No. 84-115 (D.D.C.). The district court ultimately denied the motion to dismiss. 589 F. Supp. 1182, 1187-94 (D.D.C. 1984).

The Supreme Court apparently contemplates legitimate suits by competitors to challenge corporate acquisitions. *See Brunswick*, 429 U.S. at 489 n.14 ("competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened."). In *Blue Shield* the Court emphasized the importance of this passage to a correct understanding of its *Brunswick* holding. 457 U.S. at 482.

There have been relatively few instances of suits by competitors to enjoin acquisitions as being in violation of section 7 of the Clayton Act. But in all such cases that we have found the courts held that the competitor had standing under section 16.[7] *See Cia. Petrolera*

[7] Our decision in *Pennzoil Co. v. Texaco, Inc.*, No. 84-1169 (10th Cir. Feb. 9, 1984), 1984-1 Trade Cas. ¶ 65,896, is not to the contrary. In that case Pennzoil sought to enjoin Texaco's merger with Getty Oil. The court affirmed the district court's denial of injunctive relief, but the decision was not based on any judgment as to plaintiff's antitrust standing. The court was simply analyzing whether plaintiff had satisfied the traditional requirements for injunctive relief such as a showing of a substantial likelihood of success on the merits; proof of irreparable harm; proof that the threatened injury outweighs the damage that an injunction would cause; and a showing that the injunction would not harm the public interest. These equitable concerns enter the analysis in a case such as the one we face here. But the court considers them at the stage when it determines whether a section 16 injunction is warranted for the section 7 violation; this occurs only after a plaintiff has met the causation requirement for antitrust standing.

In other section 7 cases courts have appeared to approve competitor antitrust standing. *See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1058 (6th Cir. 1984) (plaintiff seeking both treble damages and injunctive relief), *cert. denied*,

Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 407-08 (1st Cir. 1985); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), *cert. dismissed*, 53 U.S.L.W. 3620 (U.S. Feb. 14, 1985); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984). We suspect these suits are filed rarely because horizontal competitors generally do not mind seeing one of their rivals swallowed up. When they do sue they usually prefer the windfall of treble damages; then the propriety of their standing raises the special concerns involved in a section 4 claim. *See supra* section I(A). Our concern with whether competitors will file spurious antitrust suits is allayed by the requirements a plaintiff must meet. In addition to showing that the injury it is likely to suffer will be proximately caused by the section 7 violation if it occurs at all, the plaintiff must meet the stringent legal requirements of sections 7 and 16. Courts can expedite their hearing of such cases so that the mere threat of a challenge will not automatically foil a beneficial acquisition.

Here we agree with the district court that injury to competition is threatened by the antitrust violation of which Monfort complains. In 1982 four firms apparently handled 52% of the input and 53.8% of the output of the relevant products in what the district court found to be the relevant geographic markets, and Excel's

53 U.S.L.W. 3403 (U.S. Nov. 26, 1984); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 318-19 (3d Cir. 1983) (reversing trial court's denial of antitrust standing for claims seeking both treble damages and injunctive relief), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985). The vast majority of appellate cases concerning the antitrust standing of competitors in section 7 cases involve either the special problems of claims for treble damages, *see, e.g.*, *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753 (1st Cir. 1980) (per curiam); *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979), *cert. denied*, 456 U.S. 983 (1982); or a vertical relationship between companies, *see Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977) (claim for damages), *cert. denied*, 434 U.S. 1087 (1978).

acquisition of Spencer would give it 20.4% of the entire input and output markets. Although Monfort will only suffer antitrust injury if Excel abuses its market power, the causal connection will exist if the ultimate injury materializes. Therefore, we hold that Monfort has standing to seek an injunction that would block its competitor's acquisition. *Cf. Christian Schmidt Brewing Co.*, 753 F.2d at 1356-58 (concluding that competitor who alleged threatened predation had standing and could go on to trial to prove merits of section 7 violation). We now move to Excel's objections to the merits of the district court's determination that a section 7 violation was imminent.

II

Excel also objects to the district court's resolution of the substantive issues in this case: its findings that a section 7 violation occurred and that a section 16 injunction was warranted. Excel contends that the district court incorrectly defined the product market and geographic market relevant to this acquisition. It also claims that the court should not have found that significant entry barriers exist; that the court failed to consider certain economic characteristics of the beef industry that constrain collusive behavior; and that the court should not have attributed any significance to Cargill's extensive financial resources as Excel's parent company.

A

The district court found that fed cattle constitute the relevant product within the input market. 591 F. Supp. at 697. It considered and rejected Excel's argument that cows, bulls, and nonfed cattle[8] should also be included

[8] Fed cattle are steers and heifers that have been fattened in a commercial feedlot for a period of 100 to 140 days. 591 F. Supp. at 689. These cattle generally yield a higher grade of beef than nonfed cattle. *Id.* at 690. Cows and bulls are used for breeding and milk production.

within the input product market, finding that these animals are not functionally interchangeable with fed cattle. *Id.* The court defined the geographic market for fed cattle to include all or part of twelve midwestern and western states.[9] 591 F. Supp. at 698-99. The court considered and rejected Excel's contention that the market for fed cattle should encompass either the entire United States or at least the entire portion of the country east of the Rocky Mountains. *Id.*

The court defined the relevant product for the output market as all boxed beef produced either by independent fabricators or at integrated slaughter-fabrication facilities.[10] 591 F. Supp. at 703. The court considered boxed beef an economically significant product submarket within the beef industry. *Id.* at 701-03. The court considered and rejected Excel's argument that the relevant output product market should encompass all beef including, in addition to what it used for its product definition: ground beef, non-vacuum packed beef and carcass beef.[11] *Id.* at 701-03. It repudiated Excel's contention that the output market should include beef produced by "captive" fabrication facilities—facilities owned by retail supermarket chains. *Id.* at 703. The court also rejected Excel's contention that plants that currently fabricate cows, bulls, and nonfed cattle should be included because they might produce boxed beef if prices changed. *Id.* at

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[9] This market included Nebraska, South Dakota, southern Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kansas, eastern Colorado, Oklahoma, New Mexico, and the Texas panhandle. 591 F. Supp. at 698-99.

[10] The term boxed beef refers to a process for cutting slaughtered cattle into parts which are then vacuum-packed and boxed for shipment. The term "fabricate" refers to the process whereby the slaughtered carcass is broken down. For further discussion of terms of art within the beef industry, see the district court's discussion at 591 F. Supp. at 689-90.

[11] Carcass beef is beef sold in entire carcass form to wholesalers, retailers and independent fabricators for fabrication. Appellants' Brief at 38.

704. Finally, it declined to include fabricators who currently vacuum pack none or only a portion of their output because of a lack of evidence of whether such firms exist, and if they do, what amount of beef they produce. *Id.* The court defined the geographic market for boxed beef to encompass the entire United States. *Id.* at 704. It rejected Excel's argument that imported beef should be included. *Id.*

We review the district court's definition of relevant markets under the clearly erroneous standard. *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 915 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). Excel raises on appeal the same arguments regarding market definition that it asserted unsuccessfully in the district court. The district court conscientiously addressed each contention. From our review of the record we cannot say that any of the district court's conclusions on market definition are clearly erroneous.

Excel would have preferred that the district court use the current Justice Department Merger Guidelines, 47 Fed. Reg. 28,493 (1982), *revised*, 49 Fed. Reg. 26,823 (1984), both to define relevant markets and to ascertain whether the acquisition will substantially lessen competition. We agree with the district court's decision not to rely on these Guidelines. *See* 591 F. Supp. at 695-96. On the issue of market definition, a decision based on these Guidelines remains as inexact as the data gathered to make the assessment. Market definition is by its nature an imprecise task. The Justice Department's recent revisions of the 1982 market definition standards, *see, e.g.*, 49 Fed. Reg. at 26,824-25, 26,828, only strengthen our conviction that these guidelines are more useful for setting prosecutorial policy than delineating judicial standards.

B

In determining whether Excel's proposed acquisition would violate section 7, the district court found that sig-

nificant barriers restricted entry into the beef packing business. 591 F. Supp. at 707-08. Such entry barriers facilitate an oligopolist's retention of market power in a concentrated industry.

Excel does not dispute the relevance of the inquiry into whether entry barriers exist; it merely contests the significance of the barriers in the beef packing industry. Here again, we review the district court's findings under the clearly erroneous standard. *See United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

The district court heard testimony that it would cost a potential competitor anywhere from $20 to $40 million to build an integrated beef packing and fabrication plant capable of competing with Monfort or Excel. 591 F. Supp. at 707. Such a plant would require between twelve to eighteen months to plan and build. *Id.* The court considered the delay and the large capital costs significant in view of low profit margins in the industry.[12] *Id.* (quoting internal Excel report describing unlikelihood of increase in competition in light of poor profitability and large capital requirements). The court also found barriers to entry by firms wishing to acquire existing facilities; it considered especially significant defendants' own documents suggesting that suitable existing facilities are quite scarce. *Id.* Finally, the court also found that "psychological" barriers to entry existed. *Id.* at 708.

Excel objects to the district court's analysis by offering its own view about the economic realities of the industry. It argues that the court misconceived the inquiry by examining existing entry barriers in what Excel repeatedly characterizes as "the current highly competi-

[12] Excel bolsters its argument that large capital costs do not present barriers to entry by citing the Areeda-Turner treatise. Yet Excel's quotation selectively ignores the context, in which the treatise authors do conclude that capital costs may comprise barriers to entry. *See* II P. Areeda & D. Turner, *Antitrust Law* ¶ 409e at 303-05 (1978).

tive beef industry." *See* Appellants' Brief at 38, 41, 42. Excel speculates now, despite its own internal documents, that there is a high rate of return on capital investments in the industry. It cites figures from *Fortune* magazine about Monfort's present overall success. From these it infers that investments in new plants would also be profitable. It suggests, further, that collusion will quickly lead to supracompetitive rates of return, which will in turn break down any existing entry barriers. Excel refutes the court's findings about the lack of available existing capacity by referring to its own expert's testimony, testimony that the court noted but declined to heed. *See* 591 F. Supp. at 707.

We may not retry the case here on the basis of speculative arguments. Nothing in the record suggests to us that the court's finding that entry barriers exist is clearly erroneous.

C

Excel also urges that the district court should have considered a variety of other factors that it contends would make collusion difficult or impossible. It argues, in effect, that when a court finds that a merger would significantly increase a firm's market share in what is already a concentrated industry, the court should also look at specific competitive aspects of the particular industry to decide whether a large market share will readily translate into significant market power. Courts and scholars have disagreed on the relevance of such "other factors" to section 7 analysis. The current Merger Guidelines suggest that the Justice Department would examine these other factors in a close case. *See* Merger Guidelines § 3.4, 49 Fed. Reg. at 26,832-34 (1984).

In *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963), the Supreme Court indicated that a merger should be presumed illegal when market share information suggests a merger will result in a significant increase in industry concentration. The Court observed that economic data on the structure of a par-

ticular market are "both complex and elusive." *Id.* at 362. It did allow a narrow exception, however, if there is "evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* at 363.

The Supreme Court in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), clarified what evidence other than market share might be relevant to section 7 analysis. The Court approved of the district court's analysis of the structure, history, and probable future of the coal industry, and found that market share statistics were an unreliable indicator of market power because of the prevalence of long-term requirements contracts in the coal industry. 415 U.S. at 499, 501-04. The Court has continued to recognize the potential relevance of information on market structure beyond market share, *see United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 630-32 (1974), but has offered little explanation of mitigating economic factors.

Excel seeks to avail itself of the *General Dynamics* exception by arguing that future competitive behavior in the beef industry cannot be judged from past market behavior. It complains that the district court ignored expert testimony that: many buyers of beef are large and sophisticated; many substitutes exist for beef—such as poultry, pork and ground beef; cattle supplies are cyclical; individual plant costs differ widely; and high costs prohibit companies from maintaining excess unused production factilities. These factors do not establish that past information about the beef industry is inherently unreliable, nor do they resemble the factors such as long-term contracts that the Supreme Court found relevant in *General Dynamics*. Therefore, we hold that the district court properly confined its analysis to market share statistics plus limited information on industry structure, history and probable future. *See* 591 F. Supp. at 705. Such a narrow inquiry is faithful to the Court's concerns in *Philadelphia National Bank* that merger analysis stay within predictable bounds consonant with the

limits of legal and economic certainty. 374 U.S. at 362. The market share statistics are impressive: the court found that in 1982 four firms accounted for 52% of the fed cattle slaughtered in the relevant geographic area. 591 F. Supp. at 706; if the acquisition of Spencer were to be permitted, Excel would have a market share of 20.4% and two firms (IBP is the leading firm) would have 44.8%. *See* R. III, Table 7. It found that in 1982 four firms accounted for 53.8% of the nation's boxed beef produced by integrated slaughter-fabricators and independent fabrication, 591 F. Supp. at 706; if the acquisition of Spencer were permitted, Excel would have a market share of 20.4% and the top two firms, IBP and Excel, would have 47.7%. *See* R. III, Table 3.

D

Finally, Excel argues that the district court should not have attributed any significance to Cargill's extensive financial resources as Excel's parent company. *See* 591 F. Supp. at 708-09. The district court relied on *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 78-79 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974), which Excel claims is no longer valid because of subsequent changes in FTC policy. Excel urges that an acquiring firm's deep pocket is only relevant when that firm's extensive resources are likely to be used in an anticompetitive fashion. It urges us to follow the Second Circuit's analysis in *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865-66 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

We need not rule on the continued validity of *Kennecott Copper* to affirm the district court's approach. Even if we were to adopt the Second Circuit's approach, Cargill's deep pocket would still be relevant to Excel's proposed acquisition. Although the district court conceded the predatory conduct was not certain to occur, it recognized that the threat of such predation was Monfort's principal reason for trying to block the acquisition.

See 591 F. Supp. at 710; *see also supra* section I(B) (Monfort's theory of injury to support antitrust standing); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) (acknowledging that an acquisition may be unlawful because it brings "a 'deep pocket' parent into a market of 'pygmies,'" assuming that a firm's antitrust injury is tied to this type of illegal behavior). We would have no difficulty concluding that Cargill's financial resources would likely be used in an anticompetitive fashion if Excel acquired Spencer Beef and then engaged in a period of predatory pricing. Indeed predation is most likely to succeed when it can be sustained long enough to drive other companies out of business, *cf.* Easterbrook, *supra*, at 267-76, 278 (describing theoretical instances of predation); a wealthy parent company would surely facilitate such sustained predation. Therefore, we find no error in the district court's consideration of Cargill's resources.

III

Finally, Excel appeals the district court's order of February 27, 1984, holding that it violated the permanent injunction by acquiring Spencer Beef's Oakland, Iowa, plant. The court required Excel to return the plant to Spencer; we denied Excel's motion to stay that order.

Excel contends that it did not violate the spirit of the injunction by acquiring one of Spencer Beef's three plants. It urges the court to consider the circumstances surrounding the injunction as well as the language of the order.[13] We note that by taking control of the Oakland plant Excel acquired Spencer Beef's *only* operating integrated beef packing and fabrication plant. Spencer's other integrated plant in Schuyler, Nebraska, has been closed since 1982 except for a brief period following Excel's take-over of the Oakland plant.[14]

Excel's claim that it was reasonable to acquire Spencer's major operational asset despite the court's injunction strains credulity. The court phrased its injunction to forbid the proposed acquisition that was the subject of the trial. But the court "further ENJOINED [defendants] from undertaking any plan or entering into any agreement, the effect of which would be to allow the acquisition, merger, consolidation, operation or in any other way permit the combination of the ownership or operation of the beef packing businesses" of Excel and Spencer Beef. 591 F. Supp. at 710-11. We agree with the district court that defendants should have raised this less objectionable alternative of a partial acquisition at trial if they seriously wanted to contend that the injunction ultimately granted forbade only the entire acquisition. The district court wrote the second clause of the injunction in the broadest possible way using

[13] The December 1, 1983, order provided that:

"ORDER

IT IS HEREBY ORDERED that defendants Excel Corporation and Cargill, Inc. are PERMANENTLY ENJOINED from consummating the proposed acquisition between Excel Corporation, Cargill, Inc., and the Spencer Beef Division of Land O'Lakes, Inc. The defendants are further ENJOINED from undertaking any plan or entering into any agreement, the effect of which would be to allow the acquisition, merger, consolidation, operation or in any other way permit the combination of the ownership or operation of the beef packing businesses of defendants and the Spencer Beef Division of Land O'Lakes, Inc. Judgment will enter for Plaintiff Monfort of Colorado on its claim for injunctive relief. . . ."

591 F. Supp. at 710-11.

[14] Excel advances a worthy purpose argument claiming that by purchasing only the Oakland plant it enabled Spencer Beef to reopen the Schuyler plant. This argument is as irrelevant here as it is to a determination of whether a section 7 violation occurred.

absolute language. It hardly could have been clearer in intending to forbid any significant acquisition of Spencer Beef assets, having not been apprised of Excel's interest in a partial acquisition. Therefore, we find no error in the district court's order that Excel return the Oakland plant to Spencer Beef.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 83-F-1318

MONFORT OF COLORADO, INC.,
Plaintiff,
v.
CARGILL, INC. AND EXCEL CORPORATION,
Defendants.

Dec. 1, 1983

William C. McClearn, James E. Hartley, Timothy M. Rastello and Marcy G. Glenn of Holland & Hart, Denver, Colo., for plaintiff, Monfort of Colorado, Inc.

Robert F. Hanley, Denver, Colo., Alan K. Palmer, Washington, D.C., and David R. Eason of Morrison & Foerster, Denver, Colo., for defendants, Cargill, Inc. and Excel Corp.

MEMORANDUM OPINION AND ORDER

SHERMAN G. FINESILVER, Chief Judge.

Plaintiff Monfort of Colorado, Inc. ("Monfort") commenced this lawsuit to enjoin the acquisition by defendants, Cargill, Inc. ("Cargill") and Excel Corporation ("Excel"), of the Spencer Beef Division of Land O'Lakes, Inc. ("Spencer" or "Spencer Beef"). Monfort claims that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff originally moved for preliminary injunction as a result of the imminence of

the acquisition. Defendants, however, agreed to postpone consummation of the proposed acquisition and the parties stipulated to a consolidated preliminary injunction hearing and trial on the merits pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

I. ISSUES PRESENTED AND SUMMARY OF HOLDINGS

This lawsuit presents the following issues which are, to a great extent, unique to the beef industry: whether Monfort, a competitor of the principal acquiring party, Excel, has standing to challenge the acquisition of Spencer by Excel; what are the product and geographic boundaries for the relevant markets in the beef industry when analyzing the proposed acquisition under Section 7 of the Clayton Act; whether the proposed acquisition would tend to lessen competition in violation of federal law; and whether the proposed acquisition must be enjoined pursuant to Section 16 of the Clayton Act to prevent threatened violations of the Act.

The court has carefully considered the evidence, exhibits, briefs and arguments of counsel and has thoroughly reviewed the case file. For the reasons stated below, the court finds that Excel's proposed acquisition of Spencer Beef should be enjoined in that it would tend to harm competition in violation of Section 7 of the Clayton Act.

In sum, we find and conclude as follows:

1. Monfort has standing to challenge the proposed acquisition;

2. The twelve state regional market for the procurement of fed cattle and the national market for the sale of boxed beef constitute economically significant markets or submarkets within the beef industry for purposes of analyzing the proposed acquisition under Section 7 of the Clayton Act;

3. The proposed acquisition may substantially lessen competition in the regional market for the procurement of fed cattle and the national market for the sale of boxed beef in violation of Section 7 of the Clayton Act; and

4. Monfort is threatened with significant loss or damage within the meaning of Section 16 of the Clayton Act as a result of the proposed acquisition, and injunctive relief should enter to prevent threatened violations of the Act.

Accordingly, the court finds that the defendants' proposed acquisition of Spencer Beef should be PERMANENTLY ENJOINED.

The following constitute the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

II. JURISDICTION AND BACKGROUND

To better understand the issues and resolution of the case, an overview of the meat packing industry is helpful. This background is included in this section regarding jurisdiction and background analysis.

Each of the defendants is engaged directly in the sale, purchase or distribution of goods or services in interstate commerce. The production and sale of fresh beef constitute trade and commerce in and among several states and the District of Columbia. Accordingly, the court has subject matter jurisdiction over plaintiff's claims as may be required by either Section 7 of the Clayton Act or Section 1 of the Sherman Act. In addition, Defendants Cargill and Excel have admitted the personal jurisdiction of this court and have admitted that venue lies in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391 (b) and (c).

Plaintiff Monfort is a Delaware corporation with its principal place of business in Greeley, Colorado. Monfort is engaged in the production, transportation and sale of cattle, beef and lamb products. Monfort has plants for cattle slaughter and beef fabrication in Greeley, Colorado, and Grand Island, Nebraska. In addition, Monfort owns and operates commercial feedlots in Kuner and Gilcrest, Colorado.

Defendant Cargill is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Cargill operates more than 150 subsidiaries in at least 35 countries. Cargill's subsidiaries engage in various pursuits, including grain merchandising and processing, cattle feeding and beef, poultry and egg processing.

Defendant Excel is a wholly-owned subsidiary of Cargill. It is a Delaware corporation and has its principal place of business in Wichita, Kansas. Excel was formerly known as MBPXL. MBPXL was formed in 1974 as a result of a merger of Missouri Beef Packers and Kansas Beef Industries. In 1979, MBPXL was acquired by Cargill and in 1982 its name was changed to Excel Corporation.

Defendant Excel is engaged in the slaughter and fabrication of beef and beef by-products. Excel has five plants engaged in beef slaughter and fabrication: Rockport, Missouri; Friona, Texas; Plainview, Texas; Dodge City, Kansas; and Cozad, Nebraska. A sixth plant in Wichita, Kansas, is engaged only in beef fabrication. It is significant that Excel is the second largest beef packer in the United States. Ex. 19 at 5 (MBPXL Annual Report 1981-82).

On June 17, 1983, Excel signed an agreement to acquire the Spencer Beef Division of Land O'Lakes, Inc. Land O'Lakes, Inc. is an agricultural cooperative with its principal place of business in Arden Hills, Minnesota. Spencer Beef is engaged in the slaughter of cattle and

the fabrication of beef. It has plants in Spencer and Oakland, Iowa, and Schuyler, Nebraska. The Oakland and Schuyler plants have facilities for both slaughter and fabrication. The Spencer plant is engaged only in cattle slaughter. The Schuyler plant has been closed since late December of 1982. Spencer Beef is the third largest beef packer in the United States. Ex. 66 at 53, 55; Ex. 74, Att. 39 (T. Pace)

IBP, Inc., who is not a party in this action, is the largest beef packer in the United States. Ex. 22 at 5 (Excel Corp. Annual Report, 1982-83); Ex. 18 at 4; Ex. 19 at 5. IBP is a subsidiary of Occidental Petroleum Corporation, a giant multinational corporation. During the year ending December 31, 1982, Occidental Petroleum reported combined sales of well into the billions of dollars, earnings into the hundreds of millions, and assets in the billions of dollars. (See sequestered Appendix A filed with the Clerk of the Court; See also Ex. 65 at Doc. I.D. No. 1507).

Monfort maintains that Excel's proposed acquisition of Spencer Beef would result in an anticompetitive effect on the relevant markets in the beef industry in which Monfort operates. Therefore, an analysis of Monfort's claim necessarily involves a determination of the relevant markets in the beef industry and an examination of the effects that the proposed acquisition would have within those markets.

The production and sale of beef and beef products is a multi-billion dollar industry. As currently comprised, all parties concede that the industry is competitive and that profit margins are low. Defendant Excel maintains that profit margins in the industry average between .5% and 1.5% as measured against sales. Monfort's profit margin for their fiscal year ending September 2, 1983 was .8% as measured against sales. T. Monfort.

The production process in the industry begins with the feeding or grazing of cattle. There are three basic categories of cattle: (1) fed steers and heifers ("fed cattle"); (2) nonfed steers and heifers; and (3) cows and bulls.

Fed cattle are steers and heifers which have been fattened in a commercial feedlot for a period of 100 to 140 days. Commercial feedlots may be independent or integrated with the operations of a beef packer and these feedlots are generally located in areas with an abundant supply of feed grains. In addition, because of transportation costs, beef processing plants tend to be located in the proximity of commercial feedlots.

Fed cattle generally yield cuts graded USDA "good" or better. Nonfed cattle generally yield beef for grinding, by-products and cuts graded below USDA "good".

In 1983 the commercial cattle slaughter in the United States was broken down in the following way: grain fed steers and heifers—69%; nonfed steers and heifers—8%; and cows and bulls—22%.

Cattle are slaughtered at two types of plants, namely, plants which engage only in slaughtering cattle and plants which have facilities for both the slaughtering and fabrication of beef products. After slaughter, the carcass is either kept by the slaughterer for further processing or transferred whole to an independent fabricator.

At times the initial processing will be performed at a slaughter plant and then completed by an independent fabricator. "Fabrication" is the process whereby the carcass is broken down into either whole cuts (referred to as "primals", "subprimals" and "portions") or ground beef.

An "integrated firm" is a firm that both slaughters cattle and fabricates carcasses. An integrated firm generally conducts this operation in a single plant; however,

in some instances, one plant may slaughter cattle and ship the carcasses a short distance to another commonly-owned plant for fabrication. Monfort, Excel and Spencer Beef, as well as the industry leader IBP, all possess integrated slaughter-fabrication plants.

A "breaker", another term for an independent fabricator, is a firm that fabricates carcasses but does not slaughter cattle.

A limited amount of fabrication also occurs in customer-owned fabrication plants. The bulk of this captive capacity is owned by Kroger, Winn-Dixie and several other California grocery and meat market chains. Until recently, Safeway was also a major customer-fabricator.

The most reliable market share data suggests that beef processing is broken down approximately as follows: Fabrication by integrated slaughter-fabricators—60%; fabrication by independent fabricators—12%; and fabrication by customer-owned fabrication—12% The balance of the fed steer and heifer slaughter (approximately 16%) is shipped in small lots and sold to local retailers as carcasses. The carcasses are broken down and processed into primal or subprimal cuts at the local retailer level.

The fabrication process generally yields three types of products: (1) primal, subprimal and portion cuts which are vacuum packed; (2) primal, subprimal and portion cuts which are not vacuum packed; and (3) ground beef. The term "boxed beef" refers to the process by which primal or subprimal beef cuts are fabricated, vacuum-packed and boxed for shipment to retailers or distributors. Under this process, the shelf life of the beef is significantly extended.

Boxed beef is a fairly recent innovation, however, it has gradually come to dominate the beef ~~industry~~. The first important boxing technique began in the early ~~to~~ mid-1960's. Boxed beef now accounts for approximately

80% of all beef received at the retail supermarket level and at the hotel, restaurant and institutional ("HRI") level. Furthermore, the testimony at trial suggested that within the next two to three years, boxed beef will account for 85%-90% of all beef received at the retail supermarket level and the HRI level.

III. STANDING—ANTITRUST INJURY

Section 7 of the Clayton Act prohibits the acquisition of the assets of one corporation by another where in any line of commerce

> . . . the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly

15 U.S.C. § 18. Section 16 of the Clayton Act provides for injunctive relief against threatened loss or damage by a violation of the antitrust laws, including Section 7 of the Clayton Act

> . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings . . .

15 U.S.C. § 26. It is within this statutory framework that the court must analyze plaintiff's standing to bring the action and to contest the matters in question. While any harm to the plaintiff is sufficient to meet the constitutional "injury in fact" requirement, *Associated General Contractors of California, Inc. v. California State Council of Carpenters, et al.*, 459 U.S. 519, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983), the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. Congress did not intend every person tangentially affected by an antitrust violation to maintain an action challenging that violation, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct.

2540, 73 L.Ed.2d 149 (1982); *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L.Ed.2d 707 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977). The phrase "antitrust standing" has traditionally been applied to label the elements of this inquiry.

From the outset, the defendants have maintained that the plaintiff lacked the antitrust standing necessary to contest the proposed acquisition. At the close of plaintiff's case in chief the defendants moved for involuntary dismissal pursuant to Rule 41(b) on the grounds that the plaintiff had failed to establish that it would suffer any injury actionable under the antitrust laws as a result of the proposed acquisition.

Defendants argue that the harm Monfort expects to suffer as the result of the planned acquisition stems from *increased* competition that will occur in the future, rather than from an injury *to* competition stemming from the sale. In essence, it is defendants' argument that Monfort's claimed injury will derive from heightened competition between IBP and Excel following Excel's acquisition of Spencer Beef's slaughtering and packing facilities.

Plaintiff disputes defendants' position on this issue arguing that the harm it will suffer, if the acquisition is allowed to go forward, will be the direct result of a sale of assets that violates Section 7 of the Clayton Act. That being the case, plaintiff contends that it has the requisite standing necessary to bring this action and has shown that it is threatened with loss or damages sufficient to invoke the court's equitable jurisdiction available under Section 16 of the Clayton Act, 15 U.S.C. § 26.

Plaintiff claims that if the planned acquisition is allowed to go forward it will suffer losses or be damaged by the market characteristics that will exist following the sale. Monfort asserts that after the acquisition the beef slaughtering and fabrication industry will be dominated

by IBP and Excel. As noted IBP is presently the largest integrated beef slaughterer/fabricator in the nation. Excel is the second largest firm followed by the Spencer Beef division of Land O'Lakes, Inc. It is significant that the proposed sale would combine the second and third largest operations into one entity.

Following the planned sale, Monfort contends that Excel and IBP would attempt to enlarge their respective market shares as rapidly as possible at the expense of each other and, more significantly, at the expense of the smaller competitors such as Monfort. Plaintiff argues that to acquire increased market shares IBP and Excel would engage in a price-cost "squeeze" bidding up the price of the necessary raw product input supply (fed cattle) while at the same time lowering the cost of the finished output product (boxed beef).

As a result of this squeeze, which plaintiff contends would not occur absent the planned acquisition, the profit margins earned by market competitors will be severely narrowed. Plaintiff does not contend that predatory practices would be engaged in by Excel or IBP; nor does Monfort assert that Excel and IBP would act in collusion with each other in an effort to drive others out of the market. Nevertheless, Monfort argues that the vast financial resources backing Excel, a wholly owned subsidiary of Cargill, and IBP, a subsidiary of Occidental Petroleum, will permit Excel and IBP to accept far lower profit margins while they endeavor to increase market share. In contrast to Excel and IBP, Monfort asserts that it lacks the financial reserves necessary to withstand or participate in this squeeze and remain a viable competitor.

After Excel and IBP succeed in driving out the smaller competitors and acquiring increased market shares, Monfort contends that IBP and Excel will lower the price paid for fed cattle and raise the price charged for boxed beef sold nationwide. Monfort further argues that other competitors will be driven from the market and, because

of significant barriers to entry into the market, IBP and Excel will be essentially free to lower prices paid and raise prices charged without limitation. Cattle producers and feeders will suffer from lower prices paid to them and meat consumers will be required to pay higher prices for boxed beef.

The scenario described above is the harm or injury that plaintiff alleges it will suffer as a direct result of the acquisition which it contends violates Section 7 of the Clayton Act.

Defendants argue that the court need not reach the question of a possible violation of Section 7 because the plaintiff has not alleged an injury sufficient to give it standing to challenge the proposed sale. Defendants' position is that the harm that Monfort will allegedly suffer will result from an increase in competition or more vigorous competition between the remaining competitors. Therefore, defendants maintain that Monfort faces harm as a competitor rather than harm from an injury *to the competitive process*. Defendants argue that, in situations such as the one envisioned by Monfort, standing to prevent the acquisition has been rejected.

After careful consideration, it is our view that the plaintiff has established the requisite antitrust standing necessary to challenge the planned acquisition under Section 7 of the Clayton Act.

The notion of antitrust standing is not susceptible to a hard and fast rule that conveniently applies to all cases. As one commentator has noted "it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision in every case". Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. Rev. 374, 407 (1976).

Recently, however, the United States Supreme Court has attempted to identify certain factors to be considered in determining antitrust standing. *See, Associated Gen-*

eral Contractors v. California State Council of Carpenters, et al., supra. These factors include: (1) causal connection between the alleged violation and the harm; (2) the motive of the alleged violator; (3) the nature of the plaintiff's alleged injury; (4) the directness or indirectness of the alleged injury; (5) whether the injury is of the type Congress sought to redress by providing a private remedy for antitrust violations; (6) the existence of an identifiable class of persons whose self interest would motivate them to vindicate the public interest in antitrust enforcement; (7) whether denying a remedy would likely leave a significant antitrust violation undetected or unremedied; (8) the speculativeness of the damages claimed; (9) the interest in keeping the scope of complex antitrust trials within judicially manageable limits; and (10) the need to avoid the risk of duplicate recoveries.

While *Associated General Contractors* was a case involving a claim for treble damages under Section 4 of the Clayton Act, many of the factors mentioned are helpful in determining standing under Section 7 and Section 16 of the Clayton Act.

In the instant case the harm alleged by Monfort has a causal connection to the planned acquisition by Excel. Only after Excel acquires the assets of Spencer Beef will it be in a position to engage in the cost-price squeeze in an effort to acquire increased market shares. Furthermore, unlike the situation in *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 97 S. Ct. 690, 50 L.Ed.2d 701 (1977), the injury is directly related to the planned acquisition. Monfort would not be threatened if some other entity other than Excel or IBP acquired Spencer Beef's production facilities. It is only by virtue of the fact that Excel, as the second largest producer, is acquiring the assets of the third largest competitor, coupled with the geographical location of Spencer Beef's facilities, that the acquisition realistically threatens Monfort's position as a strong competitor in the marketplace.

Further, Monfort, as a direct competitor of Excel and IBP, is a member of one of the three identifiable groups who might reasonably challenge the planned acquisition. The three groups who can reasonably challenge a proposed acquisition are competitors, suppliers and consumers. In the instant case, the consumers of boxed beef and the sellers of fed cattle have no motivation, in the short term, to attack the planned sale because, at least initially, it would be a direct benefit to them. Only later when the complete impact of the acquisition is felt would these other groups have reason to complain. At that time the sale could not be prevented. As the Supreme Court noted in *Brunswick* a violation of the antitrust laws may initially result in a lower price or other actions favorable to groups who will ultimately suffer harm. *Brunswick, supra*, at 489 n. 14, 97 S. Ct. at 698 n. 14. To deny Monfort standing at this time might leave a significant antitrust violation unremedied without a single voice calling attention to the potential harm.

In some quarters the harm alleged by Monfort might be considered speculative. The testimony at trial and simple logic, however, add substance to Monfort's assertions and in our view are reflective of the dynamics in the industry in question. Monfort's allegations and proof of anticompetitive effect are sufficient, given the nature of the violation alleged, the relief sought, the industry involved and the concentration of economic power vested in a limited number of slaughter fabricators. Section 7 prescribes mergers whose effect "*may be* substantially to lessen competition or *to tend* to create a monopoly." (emphasis added). As the Supreme Court has stated on numerous occasions, Section 7

> . . . is . . . a prophylactic measure intended primarily to arrest *apprehended* consequences of intercorporate relationships *before* those relationships work their evil.

Brunswick, supra, at 485, 97 S. Ct. at 695 (emphasis added).

It is uniformly agreed that in an antitrust action seeking only injunctive relief, the question of standing becomes less of an issue. *Board of Regents of University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147, 1151 (10th Cir. 1983), *cert. granted*, —— U.S. ——, 104 S. Ct. 272, 78 L.Ed.2d 253 (1983); *Jeffrey v. Southwest Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); *In Re Multidistrict Vehicle Air Pollution* MDL No. 31, 481 F.2d 122 (9th Cir. 1973); Von Kalinowski, Antitrust Laws and Trade Regulation, Vol. 10 § 114.01 *et seq.*, vol. 3 § 11.15 (1983); Areeda, *Antitrust Analysis* 56 (3rd Ed. 1981). Concerns about duplicate treble damages awards or the need to make complex damages apportionment calculations are not present in an action seeking injunctive relief under Section 7. Because the threat of treble damages does not exist, the court may consider more freely other purposes behind giving private litigants an injunctive remedy to prevent or end antitrust violations. As the Supreme Court noted in *Zenith Corp. v. Hazeltime*, 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1968), Section 16 of the Clayton Act should be construed and applied to serve the purpose of enforcing the antitrust laws and not only to provide private relief. The availability of injunctive relief under Section 16 "should be conditioned by the necessities of the pubiic interest which congress sought to protect." *Zenith Corp., supra*, at 131, 89 S. Ct. at 1580.

The defendants have argued from the outset of this case that the plaintiff has not alleged an injury cognizable under the federal antitrust laws. Stated another way, the defendants contend that Monfort has not alleged an "antitrust injury". An antitrust injury is an injury

> of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation *or* of anticompetitive acts made possible by the violation.

> It should in short be the type of loss that the claimed violations would be likely to cause.

Brunswick, supra, at 489, 97 S. Ct. at 697. While in *Brunswick* the Supreme Court was defining the type of injury for which treble damages may ultimately be recovered, the court has also made it plain that the type of injury alleged is a factor in determining antitrust standing. *Associated General Contractors, supra.* In other words, as a threshold determination, a court must ask whether the type of harm or injury alleged is the type that the claimed violation would be likely to cause.

The plaintiff has alleged that it will be harmed or injured by the market characteristics that will exist following Excel's planned acquisition. It is plaintiff's allegation that the purchase of Spencer Beef's assets will permit Excel to engage in a price-cost squeeze in an effort to acquire a greater market share. It is realistic to believe that both IBP and Excel will be seeking a greater market share by raising the price paid for raw products and lowering the cost of their finished product. Because IBP and Excel will likely match any move by the other, any increase in market share would be at the expense of Monfort and others.

The injury alleged by the plaintiff, as described above, is not a cognizable antitrust injury according to the defendants. Defendants argue that plaintiff's injury results from more vigorous competition and not from any anticompetitive affects arising from the acquisition. Defendants rely heavily on the decision in *Brunswick, supra*, in support of their position.

We note that there are two crucial differences between *Brunswick* and the instant case. First, *Brunswick* involved an action for treble damages under Section 4 of the Clayton Act. Second, it was shown by the Court in *Brunswick* that the plaintiff might well suffer the identical injury without any antitrust violation. In contrast,

Monfort requests injunctive relief and at least suggests that the potential injury would take place only if either IBP or Excel acquired the assets of Spencer Beef.

Of more importance, however, is our view that the harm or injury alleged by Monfort is of the type that is likely to be caused by the alleged violation. Further, we believe the injury to Monfort is of the type that the antitrust laws were intended to prevent.

The purpose of Section 7 is to preclude acquisitions that may substantially lessen competition or tend to create a monopoly. Defendants argue that the acquisition of Spencer Beef's assets will increase competition rather than decrease it. According to that argument, even an acquisition that would foster collusion or predatory pricing would not violate Section 7 because competition would be greater and more vigorous. The argument is not persuasive and is rejected.

The court also rejects the defendants' contention that, unless predatory pricing or collusive activity is imminent, there can be no Section 7 violation and no antitrust injury to plaintiff. Clearly that is not the showing that must be made under Section 7. Under Defendants' interpretation Section 7 would be unnecessary because the antitrust laws already prohibit that type of conduct and permit it to be enjoined where it is occurring or where it is imminent. *See*, 15 U.S.C. § 1; 15 U.S.C. § 26.

Section 7 was designed to prevent the acquisition of one corporate entity by another where the effect of the acquisition *may be* to substantially lessen competition or to *tend* to create a monopoly. The section is intended to prevent those acquisitions which set the stage for lessened competition or create the climate or atmosphere for monopolistic behavior. The party seeking *injunctive relief* need not show that a violation of another antitrust statute is imminent.

Given the purpose of Section 7 plaintiff has alleged an antitrust injury sufficient to support a finding of antitrust standing. The plaintiff alleges that the acquisition may substantially lessen competition and that its competitive position will be directly harmed as a direct result of the acquisition. Further, plaintiff's position is that if the acquisition does not take place *or* if someone other than a market leader acquires Spencer Beef, Monfort would not be harmed.

Were we to accept defendant's argument, *no* private individual could contest the planned acquisition. Competitors would be barred because any injury to them would not stem from collusion or predation. Taking defendants' position to its logical conclusion, consumers and cattle feeders could not seek injunctive relief both because they would not be presently harmed and because any alleged harm in the future would be mere ephemeral possibilities, too speculative to seek relief under Section 7.

The courts have specifically recognized that Section 7 may be violated by actions that, absent Section 7, would not constitute violations of other antitrust laws. *FTC v. Procter & Gamble*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed. 2d 303 (1966). As the court stated in *Procter & Gamble*

> If enforcement of Section 7 turned on the existence of actual anticompetitive practices the congressional policy of thwarting such practices in their incipiency would be thwarted.

Procter & Gamble Co., supra at 577, 87 S.Ct. at 1229.

The position of the defendant, if accepted, would eliminate private enforcement of Section 7. However, Congress did not intend that only the federal government could challenge such an acquisition.

> [T]he purpose of giving private parties treble damage and injunctive remedies was not merely to pro-

vide private relief but was to serve as well the high purpose of enforcing the antitrust laws.

Zenith Corp. supra, 395 U.S. at 130-31, 89 S. Ct. at 1580.

In sum we are of the view that, given the factors mentioned by the Supreme Court in *Associated General Contractors, supra*, the plaintiff has established sufficient antitrust standing to bring an action for injunctive relief under Sections 7 and 16 of the Clayton Act. To the extent that antitrust injury is a key factor, the plaintiff has alleged sufficient facts to satisfy this requirement as a part of the standing inquiry.

IV. JUSTICE DEPARTMENT MERGER GUIDELINES

The defendants contend that this court should give careful consideration to the analysis of the facts of this case under the merger guidelines developed by the Department of Justice. 47 Fed. Reg. 28,493 (1982). First promulgated in 1968, the guidelines were substantially redrafted by the Department and re-released in June of 1982.

Department of Justice Merger Guidelines are not binding on this court in our determination of the impact that defendants' acquisition will have on competition. The guidelines are primarily a statement of the Justice Department's own enforcement intentions and serve as a tool to assist Justice Department attorneys in determining which mergers to challenge. They do not represent legal precedent to determine illegality. Indeed the Justice Department is not necessarily bound by their own guidelines in their handling of litigation under Section 7 of the Clayton Act. U.S. Department of Justice Merger Guidelines. § I, 47 Fed. Reg. 28,493 and 28,494 (1982).

We have considered the Merger Guidelines in the process of resolving this case. However, in determining whether the planned acquisition will violate Section 7 of

the Clayton Act, the Court has relied primarily on the judicial standards developed in judicial precedents arising under Section 7.

V. RELEVANT MARKETS

Before considering whether a proposed acquisition will have a proscribed effect on competition, it is necessary to define the market with respect to which the competition may be said to exist:

> [d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantiality can be determined only in terms of the market affected.

Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523, 8 L.Ed.2d 510 (1962), quoting from *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S. Ct. 872, L.Ed.2d 1057 (1957).

In the instant case, plaintiff maintains that the proposed acquisition will have potential anticompetitive effects in two different markets: (1) the regional market for the procurement of fed cattle (the "input" market); and (2) the national market for the sale of packer boxed beef (the "output" market).

At trial, knowledgeable and respected experts rendered opinions that led to contrary interpretations regarding the scope of the relevant product and geographic markets in the input and output markets. We have endeavored to determine those opinions which represent the more probable state of events and the relative weight to be given each. In general, however, the court found the experts who were called by Monfort to be particularly persuasive in that they emphasized the actual conditions

in the marketplace as well as the theoretical implications of the proposed acquisition.

A. THE INPUT MARKET

The "relevant market" concept entails two separate dimensions: (1) the product market or "line of commerce"; and (2) the geographical market or "section of the country." *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268, 279, 55 S. Ct. 182, 185, 79 L.Ed. 356 (1934); *United States v. M.P.M., Inc.*, 397 F.Supp. 78 (D. Colo. 1975). The product market is normally considered first because the geographic market typically depends on the nature of the product involved. *See, e.g. United States v. Pabst Brewing Co.*, 384 U.S. 546, 555-556, 86 S. Ct. 1665, 1670-1671, 16 L.E.2d 765 (Harlan, J., Concurring).

1. Product Market

Plaintiff maintains that the relevant product in the input market is grain fed steers and heifers ("fed cattle"). Plaintiff contends that fed cattle should be considered a separate product market because grain fed steers and heifers are the only cattle which will produce beef with a consistent quality of U.S.D.A. "good" or above. In addition, plaintiffs alleges that the product market should not include the facilities of slaughterers of nonfed cattle for the following reasons: (1) slaughterers of fed cattle and non-fed cattle are generally in different parts of the country; (2) cow and bull slaughtering facilities lack important economies of scale because they are smaller than the facilities used to slaughter fed cattle; (3) such facilities lack fed cattle fabrication facilities, and it is not economically feasible to ship carcasses; (4) customers who purchase fed cattle are generally unwilling to buy from slaughterers who deal to any great extent in non-fed cattle; and (5) defendants' internal reports indicate their belief that fed cattle constitute a separate product market.

Defendants suggest that the relevant product in the input market should include all cattle slaughtered because nonfed steers and heifers and cows and bulls are substitutes for fed cattle. Defendants also contend that, from the perspective of a seller of fed cattle, any purchaser able and willing to purchase fed cattle is a perfect substitute for present fed cattle purchasers. Therefore, defendants believe that the product market should be expanded to account for the capacities of the following groups which defendants assert would purchase fed cattle if prices decline below competitive levels: (1) large scale fed cattle sellers who would integrate forward into slaughtering, and perhaps, fabrication; (2) firms that currently purchase cows and bulls as well as fed cattle, which would increase purchases of fed cattle; and (3) plants that currently slaughter only cows and bulls which would convert to fed cattle slaughter.

In determining whether products are within the same relevant product market, it is important to consider the functional and reasonable interchangeability of the products, *See United States v. E.I. du Pont de Nemours & Co., supra*; *Kaiser Aluminum & Chemical Corp. v. F.T.C.*, 652 F.2d 1324 (7th Cir. 1981); *United States v. Charles Pfizer & Co.*, 246 F.Supp. 464, 468 (E.D.N.Y. 1965); the cross-elasticity of demand for the products, *See*, *Brown Shoe Co. v. United States, supra; United States v. E.I. du Pont de Nemours & Co., supra;* and the interchangeability of the products' production facilities, *See*, *Kaiser Aluminum & Chemical Corp., supra; Equifax, Inc. v. F.T.C.*, 618 F.2d 63 (9th Cir. 1980).

Comparing the evidence presented at trial to the case law cited above, the Court finds that fed cattle constitute the relevant product within the input market.

We reject defendants' argument that nonfed cattle and cows and bulls are viable substitutes for fed cattle. To classify products in the same market, it is essential that they be both functionally and reasonably interchangeable.

In today's market, under the evidence, we are persuaded that nonfed cattle and cows and bulls are not functionally interchangeable with fed cattle. The evidence presented at trial demonstrated that grain fed steers and heifers are the only cattle which yield beef cuts with a consistent quality of USDA "good" or better. Ex. 74 (Pace Testimony), Att. 3 at 1-2. Furthermore, plaintiff's witnesses testified that cows and bulls and nonfed steers and heifers will not substitute for fed cattle. Strealer, T. 20. This fact is best illustrated by the overwhelming percentage of fed cattle compared to nonfed cattle or cows and bulls, which are slaughtered and fabricated by the parties themselves. The slaughter of cows and bulls accounted for less than 1% of Excel's total slaughter in 1982. Ex. 74 (Pace Testimony), Att. 4. In fact, cow and bull slaughter represented only 0.3% of the 1982 slaughter by major packers, including Excel, IBP, Spencer and Monfort. *Id.*

Defendants further maintain that the input product market should be expanded to include all cattle slaughtered because of the claimed interchangeability of the slaughter facilities for nonfed and fed cattle. The court rejects this attempt to expand the product market in this case.

The degree to which a manufacturer may employ existing facilities to produce different products is a relevant factor in defining a broad product market under Section 7 of the Clayton Act. *See, e.g., Kaiser Aluminum & Chemical Corp., supra; Equifax, Inc. v. F.T.C., supra.* However, it is necessary in making such an analysis to adopt a realistic view of the market. In order to justify expanding a relevant product market due to interchangeability of production facilities, it is necessary to focus on what manufacturers *actually* do as opposed to what they *could* do. Whatever modifications would be required to change to a different type of production must be feasible from the point of view of design and cost. *See, Memorex Corp., v. I.B.M.*, 458 F. Supp. 423, 429 (C.D. Cal. 1978), *aff'd.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972, 101 S. Ct. 3126, 69 L.Ed.2d 983 (1981); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 985 (N.D. Cal. 1979), *aff'd.*, 698 F.2d 1377 (9th Cir. 1983).

In the instant case, the court finds that the existence of nonfed cattle slaughtering plants is not a significant competitive check on fed cattle slaughterers' pricing activities. An exhibit from Excel's files supports the conclusion that it would not be cost effective for a slaughterer of nonfed cattle to switch in whole or in part to slaughtering fed cattle:

> Combining cow slaughter/processing with fed beef slaughter/processing has not proven to be an efficient operation. During the cow liquidation of 1976/1977 we combined a cow slaughter with a fed beef slaughter in our Rock Port plant. The results of this experience were unfavaroble.

Ex. 29 at 2 (Memorandum from Bill Nicholson to M.D. McVay, et al.)

This inefficiency apparently stems at least in part from the fact that cow and bull slaughter plants tend to be smaller than fed cattle slaughter plants. *Id;* T. Stout. Due to their smaller size, nonfed cattle slaughtering plants lack some of economies of scale that exist in fed cattle plants. The importance of such economies of scale are of added significance in this case because of the relatively low profit margin in the beef industry. Therefore, the relative lack of such economies of scale would place companies utilizing nonfed cattle slaughter facilities at a comparative disadvantage in the slaughter of fed cattle.

In addition, nonfed cattle slaughter facilities generally lack fabrication facilities. Therefore, most of the nonfed cattle slaughtering firms which might consider switch-

ing to fed cattle slaughter would have to add fabrication facilities or market their output by shipping carcasses. As will be discussed below, transporting carcass beef is uneconomical compared to transporting boxed beef, and boxed beef and carcass beef should not be included within the same relevant product market. Furthermore, the lack of integrated facilities would result in such a firm being unable to derive the benefit enjoyed by integrated firms with respect to the efficient use of byproducts. Ex. 30 at 1 (Changes in the Beef Packing Industry, Notes for Caprock Annual Meeting, June 24, 1983).

Finally, Mr. Monfort testified that customers who typically purchase beef graded USDA "good" or better (typically boxed beef), prefer not to buy from firms that engage in a substantial volume of cow and bull slaughtering.

For reasons stated above, the court finds that firms currently slaughtering nonfed cattle would not significantly increase their purchases of fed cattle or switch to the slaughter of fed cattle in response to a decline in the price of fed cattle. In addition, the court finds no substantial evidence to indicate that large scale fed cattle sellers would to any great extent integrate into the slaughter and fabrication of fed cattle in response to a decline in the price of fed cattle. Any resulting increase in purchases of fed cattle would not provide a competitive check on the current purchasers of fed cattle. In light of these findings, the court is of the opinion that the input product market should not be expanded to include all potential purchasers of fed cattle. Accordingly, the court concludes that the procurement of fed cattle is the relevant product within the input market. This is the legitimate and common-sense market upon which we will evaluate the effects of the proposed acquisition.

2. Geographic Market

The relevant geographic market for the procurement of fed cattle is an additional issue.

Plaintiff maintains that this aspect of the input market is regional in scope. According to plaintiff, the regional procurement market includes all or parts of the following twelve states: Nebraska, South Dakota, Southern Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kansas, Eastern Colorado, and the panhandle region of Texas, Oklahoma and New Mexico.

Conversely, defendants assert that the procurement market should include the entire United States or at the very least the United States east of the Rocky Mountains. Defendants argue that any attempt to depress prices below competitive levels would result in the diversion of fed cattle sales to areas outside of the twelve state area suggested by plaintiff.

The relevant geographic market in a case under Section 7 of the Clayton Act is the area in which the seller competes and in which buyers can practicably turn for supply. *United States v. Connecticut National Bank*, 418 U.S. 656, 94 S. Ct. 2788, 41 L.Ed.2d 1016 (1974); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-332, 81 S. Ct. 623, 630, 5 L.Ed.2d 580 (1961). Case law indicates that when analyzing the relevant geographic market in a case such as this, it is necessary to determine "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *See, United States v. Philadelphia National Bank*, 374 U.S. 321, 357, 83 S. Ct. 1715, 1738, 10 L.Ed.2d 915 (1963); *F & M Schaefer Corp. v. Schmidt & Sons, Inc.*, 597 F.2d 814, 817 (2nd Cir. 1979); *United States v. M.P.M., supra.*

In conducting the analysis, it is critical to focus on the commercial realities of a particular market. *See, United States v. M.P.M., supra; United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 90 S. Ct. 2035, 26 L.Ed.2d 658 (1970). In particular, courts have considered the following economic factors in determining the geographic scope of relevant markets: (1) transpor-

tation costs, *see, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 571, 87 S. Ct. 1224, 1226, 18 L.Ed.2d 303 (1967); *United States v. M.P.M., supra;* (2) the localized nature of demand, *see, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 94 S. Ct. 2856, 41 L.Ed.2d 978 (1974), *United States v. First National Bancorporation, Inc.*, 329 F. Supp. 1003, 1012-1014 (D. Colo. 1971), aff'd per curiam by an equally divided court, 410 U.S. 577, 93 S. Ct. 1434, 35 L.Ed.2d 507 (1973); and (3) industry recognition of a particular geographic area as a distinct market. *See e.g., United States v. Phillipsburg Nat'l Bank & Trust Co., supra; F & M Schaefer Corp. v. C. Schmidt & Sons, Inc., supra.* Two common sources of industry recognition are the statements and perceptions of the merging firms and other industry members. *See, e.g., F & M Schaefer Corp. v. C. Schmidt & Sons, Inc., supra* at 816-817; *United States v. Kimberly-Clark Corp.*, 264 F.Supp. 439, 455 (N.D. Cal. 1967). Furthermore, within a broad geographic market, an economically significant submarket may also exist. *United States v. Marine Bancorporation, supra.*

Comparing the evidence presented at trial against the backdrop of persuasive case law, the court finds that the relevant geographic area for the procurement of fed cattle is the twelve state regional market described by the plaintiff. This twelve state market is the meat producing center of the country as it relates to fed cattle.

Although the demand for beef may be national in scope, the evidence at trial indicated that the procurement of fed cattle is relatively localized in nature. Nearly all fed cattle are purchased less than 200 miles from the slaughter plant. Ex. 61 at 80 (Fed Cattle Procurement and Pricing, and Beef Packer Competition—An Empirical Study, C. Ward, December 1981); Knobbe, T. 27, Webber, T. 34-35. In fact, the evidence at trial suggested that most fed cattle are purchased from feedlots within 100 miles of the slaughter plant. Ex. 74 (Pace

Testimony), Att. 25 (USDAS Report on Concentration in the Meat Packing Industry—National Procurement Levels, Sept. 24, 1979 and April 29, 1980, App. 22).

As noted above, statements and perceptions of the merging firms are common sources of industry recognition of a relevant geographic market. In the instant case, defendant Excel's own statements and perceptions confirm the localized nature of the procurement market. For example, an internal memorandum of Excel describes its "normal buying area" as the area within 150 miles of its packing plants. Ex. 27 at 1 (MBPXL memorandum from B. Nicholson to R.W. Watson, Oct. 26, 1982). Furthermore, a "procurement area" map contained in an Excel publication indicates that Excel's primary purchasing area is a geographic region comparable to the twelve state region suggested by plaintiffs. Ex. 33B at Doc. I.D. No. 4018 (Excel: America's Beef Company).

Defendants contend that the procurement market should be national in scope because it is dependent on the nationwide demand for beef. Defendants reason that since the demand for fed cattle and hence their price, is derived from the demand for beef, it follows that the price of fed cattle is determined in a nationwide market. Defendants contend that this argument for a nationwide procurement market is supported by the high degree of uniformity and interdependence in the movement of fed cattle prices throughout the continental United States.

The court recognizes that evidence of nationwide pricing interdependence is some evidence in support of a nationwide market. In the same way, localized demand and the existence of regional price differentials support the conclusion that a market is regional in scope.

Conflicting evidence was presented at trial regarding the existence of price interdependence and regional price differentials. The court, however, is persuaded as to the existence of such differentials by defendant Excel's own

statements regarding its motivation for acquiring the Spencer assets. In several internal memoranda, Excel or Cargill representatives suggested that a primary reason for the attempt to acquire Spencer Beef was the desire to take advantage of differences in fed cattle prices found in a regional market defined as the western cornbelt (eastern Nebraska, western Iowa and southwestern Minnesota). Ex 5 at Doc. I.D. Nos. 554-56 (Cargill memo from M.D. McVay to W. Watson, et al., Dec. 10, 1982); Ex. 4 at Doc. I.D. 321-322 (Excel memo from W. Watson to Finance Comm., May 25, 1983). These statements by the defendants strengthen the conclusion that regional price differentials exist in the procurement market, and that the relevant procurement market in this case is regional in scope.

Defendants also contend that the regional procurement market would expand significantly in response to an effort by current purchasers to depress the price of fed cattle. The court, however, finds that the procurement market would not significantly expand in such a situation because of the high transportation costs in the beef industry. The evidence at trial indicated that transportation costs and shrinkage costs place substantial limitation on the procurement market. Roberts, T. 12, 20, 26; Webber, T. 31-32, 38; Knobbe, T. 28-29, 50-51. In addition, although the court recognizes that transportation and shrinkage costs are not as great per mile after the first 150-200 miles, the court is persuaded by Mr. Monfort's testimony that such costs are still high in proportion to the relatively small profit margins in this industry. Accordingly, the court finds that transportation costs are a major factor which realistically confine the procurement market to the twelve state area outlined by plaintiff.

In addition to the limits imposed by transportation costs, the court notes that the scope of the procurement market is also limited by the relative lack of facilities

for the slaughter and fabrication of fed cattle outside of this twelve state region. Although the evidence showed that there is some slaughter capacity for fed cattle outside of the twelve state region, that capacity is limited. Ex. 26 (Excel memo regarding slaughter and fabrication capacities of United States plants, April 15, 1983). As noted above, the twelve state region accounts for 74% of all fed cattle marketed in the United States. Ex. 60 at 10 (Geographic Market and Prices for Fed Steers and Heifers, USDA P & S Report, April 1982). Accordingly, if the price of fed cattle within the twelve state region was artificially depressed, the limited capacity outside of the region does not appear to represent a viable alternative for purchasing, slaughtering and fabricating the cattle fed within the region.

In several documents, Excel representatives suggested that the general area referred to as the twelve state region is a distinct procurement market. Ex. 4 at Doc. I.D. No. 321 (Support for Acquisition of Spencer Beef Plants, Excel memo from W. Watson to Finance Comm., May 25, 1983); Ex. 19 at 7 (MBPXL Annual Report, 1981-82); Ex. 74 (Pace Testimony), Att. 28 (Documents Showing Excel's View of Procurement Areas); Ex. 70 at 4-5 (MBPXL LRPC Report, Jan. 25, 1982). These documents lend further support to the conclusion that the twelve state region represents a distinct regional market for the procurement of fed cattle.

In sum, the court concludes that the relevant product in the input market consists only of fed steers and heifers. In addition, the relevant geographic scope of the procurement market is the twelve state region outlined by the plaintiff.

B. OUTPUT MARKET

The proposed acquisition must also be analyzed in terms of its effect on a second relevant market on the "output" side of the beef packing industry.

Monfort maintains that the relevant output market is the national market for boxed beef produced both by integrated packers and independent fabricators. Within that market, Monfort contends that there exists a product submarket consisting only of packer boxed beef.

Defendants maintain that the relevant product market on the sales side encompasses all beef, including ground beef, packer boxed beef, boxed beef produced by independent fabricators, non-vacuum packed beef, and carcass beef. In addition, defendants maintain that the product market should be expanded to include the following groups which allegedly would increase their sales of boxed beef if boxed beef prices were raised above compettitive levels: (1) current boxed beef producers who could increase their production of boxed beef; (2) fabricators who currently vacuum pack none or only a portion of their output and could increase their proportion of vacuum packed cuts; (3) firms which fabricate cows, bulls and nonfed cattle which could turn to or increase their fabrication of fed cattle; and (4) large retailers which could commence or increase their own fabrication operations.

The parties agree that the geographic market on the sales side is the entire United States. Defendants, however, contend that the relevant output market should also include all beef imported into the United States.

1. Product Market

In determining whether items are within the same relevant product market, as noted above, it is important to consider the functional and reasonable interchangeability of the products, the cross-elasticity of demand for the products, and the interchangeability of the products' production facilities.

Furthermore, the existence of a broad product market does not negate the existence of an economically significant submarket. *See United States v. Continental Can Co.*, 378 U.S. 441, 84 S. Ct. 1738, 12 L.Ed.2d 953 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271, 84 S. Ct. 1283, 12 L.Ed.2d 314 (1964); *Brown Shoe Co. v. United States*, *supra*. The Supreme Court has suggested several criteria against which the facts of a particular case may be measured:

> [1] industry or public recognition of the submarket as a separate economic entity, [2] the product's peculiar characteristics and uses, [3] unique production facilities, [4] distinct customers, [5] distinct prices, [6] sensitivity to price changes, and [7] specialized vendors.

Brown Shoe, *supra*, 370 U.S. at 325, 82 S. Ct. at 1524 (citation and footnote omitted) (bracketed numbers added). It is not necessary for a plaintiff to demonstrate the existence of all seven of the factors enumerated in *Brown Shoe* in order to demonstrate the existence of an economically significant submarket. *See, United States v. M.P.M.*, *supra*.

Although there are various beef products which might be placed within the same broad product market (i.e. all beef), we find that boxed beef constitutes an economically significant product submarket within the beef industry.

Initially, the court notes that the evidence at trial suggested that there is strong industry recognition of boxed beef as an economically significant product submarket. In particular, defendants' own documents indicated recognition of boxed beef as a separate submarket. Excel has referred to its "basic business of buying fed cattle and selling boxed meat," and it has compared its performance to IBP's in "the boxed beef market in the United States." Ex. 16 at 2 (MBPXL Annual Report, Jan. 18, 1981); Ex. 14 at 5 (MBPXL Annual Report,

1980-81); Ex. 19 at 5 (MBPXL Annual Report, 1981-82).

Furthermore, the court finds that ground beef should not be included in the same submarket as boxed beef. Although ground beef and boxed beef are, in one sense, interchangeable as food stuffs, the two products are not functionally interchangeable in several important respects. The testimony at trial indicated that there are many uses, particularly in the HRI sector, for which the better cuts of beef (i.e. boxed beef) is the only suitable product. Strealer, T. 31. In addition, the testimony at trial demonstrated that boxed beef and ground beef are the products of substantially different production facilities. Finally, although the court heard conflicting testimony regarding the relationship between the prices of boxed beef and ground beef, it is indisputable that substantial price differentials exist between ground beef and the better cuts of boxed beef. Ex. 74 at 17 (Pace Testimony) and Att. 20 ("Hamburger and Beef Consumption and Prices, 1971-1981", *Meatfacts* at 17, 1982 Ed.). The existence of such price differentials is additional evidence supporting the conclusion that the two products do not belong in the same relevant market. *See, Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223, 229 (D.C. Cir. 1962).

Therefore, utilizing in part *Brown Shoe* criteria, we can only conclude that boxed beef and ground beef should not be included in the same product submarket.

We have also considered and reject defendants' contention that carcass beef and boxed beef should be included within the same product submarket. We recognize that the ultimate consumer is probably unable to distinguish between carcass beef and boxed beef. We find, however, that boxed beef and carcass beef are not functionally interchangeable to the retail store owners and HRI buyers who are the primary purchasers of such products. The evidence at trial indicated that the attributes of

boxed beef, such as reduced transportation costs, reduced labor costs, and longer shelf life, contribute to the general superiority of boxed beef over carcass beef. This evidence also supports the conclusion that boxed beef and carcass beef do not belong in the same relevant product market. For example, Excel has estimated that the direct cost per pound to the retailer may be reduced by 8.3% when boxed beef is utilized rather than carcass beef. Ex. 33A at 19-22 (Boxed Beef—The Economic Advantages). This figure is particularly significant in light of the evidence cited above regarding the relatively low profit margins in the beef industry. Furthermore, although Excel maintains that their estimate regarding the cost savings associated with boxed beef is a best case analysis used in advertising, the relative advantages of boxed beef over carcass beef are reflected in the growing dominance of boxed beef in the beef industry. The evidence at trial indicated that carcass beef sales currently account for only 16% of fed steer and cattle slaughter. Moreover, the market share of boxed beef has risen from zero to 80% in the past 20 years, and it appears that this trend will continue in the future. Ex. 24 at 7-8 (Excel LRPC Report, Jan. 24, 1983); Ex. 70 at 3 (MBPXL LRPC Report, Jan. 25, 1982); Ex. 25 at 3 (Excel LRPC Report, April 25, 1983). An exhibit from Excel's files concludes: "As we have stated before, it is not a matter of if, but a matter of when the processor puts all or just about all of the cattle in a box." Ex. 12 at 4 (LRPC Meeting, Jan. 21, 1980). Finally, the court notes that Excel documents suggest that Excel, prior to this lawsuit, considered boxed beef and carcass beef to be separate products within separate markets. Ex. 13 at 4 (MBPXL LRPC Report, April 21, 1980); Ex. 29 at 1 (Excel memo from B. Nicholson to M.D. McVay, et al., Dec. 31, 1982). It is our view and we so find that carcass beef and boxed beef should not be included within the same relevant product market.

For similar reasons, the court finds that the relevant product market should not include beef fabricated at captive fabrication facilities owned by retail supermarket chains. Such facilities inherit the inefficiencies associated with carcass beef because, by definition, they break carcasses that have been transported by a slaughterer. These inefficiencies, according to evidence at trial, have resulted in a continuing decline in the market share of such facilities as retail stores discontinue their fabrication operations. Ex. 13 at 4 (MBPXL LRPC Report, April 21, 1980; Ex. 16 at 5 (MBPXL LRPC Report, January 1981); Ex. 25 at 3 (Excel LRPC Report, April 25, 1983); Ex. 70 at 3 (MBPXL LRPC Report, Jan. 25, 1982). Furthermore, the testimony at trial indicated that captive fabrication facilities, as a result of their size and nature, use different production procedures and have different types of production facilities than are found in integrated plants or independent fabrication plants. T. Monfort. We note that this limited product line is not available to many of the current purchasers of boxed beef produced at integrated facilities and independent fabrication plants. Captive fabrication facilities owned by retail supermarket chains sell their product directly to ultimate consumers through those chains; accordingly, these facilities apparently do not sell a significant portion of their product to the HRI segment of the market.

Thus, beef fabricated by captive fabrication facilities owned by retail supermarket chains should not be included in the market for the sale of boxed beef produced by integrated plants and independent fabricators. In addition, the court finds that this source of beef does not provide a competitive check on the relevant product market.

An additional finding is that the relevant product market includes all boxed beef produced by independent fabricators as well as boxed beef produced from integrated facilities.

As noted above, the plaintiff has the burden of establishing the relevant product market in an action under Section 7 of the Clayton Act. In the instant case, the plaintiff failed to demonstrate that boxed beef from independent fabricators should not be included in the relevant product market. The court recognizes that independent fabricators may incur relatively higher transportation costs than do integrated beef producers. Ex. 13 at 7 (MBPXL LRPC Report, April 21, 1980). The court also acknowledges that independent fabricators may, to some extent, lack certain economies of scale possessed by integrated firms. Ex. 26 (MBPXL memo listing slaughter and fabrication capacity of plants in the United States.) Furthermore, the court recognizes that the existence of product codes, such as the product code associated with packer boxed beef, is some evidence of that product being a part of an economically significant submarket. *See, M.P.M. v. United States, supra.* However, the court finds that the boxed beef produced by independent fabricators is functionally interchangeable with boxed beef produced at integrated facilities. In addition, the plaintiff was unable to quantify any substantial difference in the prices of the two "types" of boxed beef. Finally, these two types of boxed beef are sold to comparable customers by comparable vendors. Accordingly, the court finds that the relevant product market on the sales side should include boxed beef produced by independent fabricators.

Therefore, the court finds that boxed beef constitutes an economically significant submarket in the beef industry. The court includes within the relevant product market all boxed beef produced by independent fabricators and at integrated slaughter-fabrication facilities.

Defendants maintain that the relevant product market should be expanded to account for firms which would increase their production of boxed beef in response to an increase in the price of boxed beef.

As noted before, the degree to which a manufacturer may employ existing facilities to produce different products or expand production of a particular product is a relevant factor in defining a product market under Section 7 of the Clayton Act. However, as outlined above, it is necessary in making such an analysis to adopt a realistic view of the market and focus on how manufacturers actually would react in a situation as well as how they could react.

The court considered and rejects defendants' contention that the product market should be expanded to account for a potential increase in the fabrication of boxed beef by firms which currently fabricate nonfed cattle and cows and bulls. As observed before, plants which slaughter and fabricate nonfed cattle and cows and bulls generally lack the size and economies of scale that are found in plants which currently slaughter and fabricate boxed beef. In addition, the testimony at trial indicated that purchasers (particularly in the HRI market) are generally unwilling to purchase boxed beef from plants which also deal, to any great extent, in nonfed cattle and cows and bulls. Accordingly, the court finds that the limited amount of boxed beef which might be produced by such firms in response to a change in boxed beef prices would not significantly affect or expand the relevant product market.

Furthermore, the court finds that the product market would not be significantly expanded by increased production by fabricators who currently vacuum pack none or only a portion of their product. The amount of beef currently produced by these fabricators is not clear nor do we have any indication as to what extent such fabricators might increase their production of boxed beef in response to an increase in the price of boxed beef. In this regard, Mr. Monfort testified that he was unaware of any firms that currently fabricate beef but fail to vacuum pack their product. Accordingly, the court finds that the product market should not be expanded to account for the

reactions that these firms might have in the face of an increase in the price of boxed beef.

The court, however, accepts the defendants' contention that the relevant product market should reflect the capacity of current producers of boxed beef to increase their production in response to an increase in the price of boxed beef. To the extent that these producers could and would increase their production, that production should be included in the relevant market. Therefore, in analyzing the effect of the proposed acquisition, the court will note the current capacity of the various firms that fabricate boxed beef. However, to the extent that the defendants maintain that the court should include a firm's ability to increase its capacity through acquisition or new construction, the court will consider this argument in connection with its analysis of entry barriers in the beef industry.

In summary, the court finds that the relevant product in the output market includes boxed beef produced at integrated facilities and by independent fabricators. This product market also includes the capacity of current producers of boxed beef to increase their production in response to an increase in the price of boxed beef.

2. Geographic Market

The parties agree that the market for the sale of boxed beef is national in scope, however, the defendants maintain that the geographic market should be expanded to include beef that is imported from other countries.

The court rejects the defendants' contention that the relevant market should include imported beef. The evidence at trial indicated that the great majority of imported beef is ground beef which is ultimately used in the production of sausage and hamburger. The court has previously found that ground beef should not be included within the relevant product market. Therefore, for the reasons already discussed, imported ground beef should

not be included in the relevant geographic or product market.

VI. PROBABLE EFFECT OF THE PROPOSED ACQUISITION

Section 7 of the Clayton Act prohibits mergers where in a relevant product and geographical market "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1950). To establish a violation of Section 7 of the Clayton Act, therefore, a plaintiff need only demonstrate that the effect of an acquisition "may" be substantially to lessen competition. The Clayton Act provides "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency." *Brown Shoe, supra,* 370 U.S. at 317, 82 S. Ct. at 1520. For a given merger to be proscribed, however, more is required than a "'mere possibility' of the prohibited restraint. . . ." *FTC v. Consolidated Foods,* 380 U.S. 592, 598, 85 S. Ct. 1220, 1224, 14 L.Ed.2d 95 (1965); *United States v. M.P.M., supra,* at 90. ". . . Section 7 deals in 'probabilities,' not 'ephemeral possibilities.'" *United States v. Marine Bancorporation, supra,* 418 U.S. at 622-23, 94 S. Ct. at 2870; *Brown Shoe Co., supra,* 370 U.S. at 323, 82 S. Ct. at 1522.

Market shares and industry concentration have traditionally been viewed as two of the most important factors used in measuring the likely anticompetitive effect of an acquisition challenged under Section 7 of the Clayton Act. *Brown Shoe Co., supra,* at 321, 82 S. Ct. at 1521. Furthermore, sufficiently high concentration and market share statistics can result in a prima facie showing of a violation of Section 7 of the Clayton Act. *See, United States v. Philadelphia Nat'l Bank, supra,* 399 U.S. at 363, 83 S. Ct. at 1741; *United States v. M.P.M., supra,* at 91.

There is no clear rule regarding what level of concentration or market share is necessarily violative of Section 7 of the Clayton Act; however, the Supreme Court has held acquisitions to be violations of Section 7 when the statistical indications showed relatively low market shares resulting from the acquisition. *See, e.g., United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S. Ct. 1665, 16 L.Ed.2d 765 (1966) (nationwide market for the sale of beer, combined market share of the acquired and acquiring company was 4.49% of total sales); *United States v. Von's Grocery Co.,* 384 U.S. 270, 86 S. Ct. 1478, 16 L.Ed.2d 555 (1966) (Los Angeles market for the sale of retail groceries, combined market share was 7.5% of total sales). In recent years, these cases have been strongly criticized. R. Posner, *Antitrust Law* 105-09 (1976); R. Bork, *The Antitrust Paradox* 217-218 (1978). Nevertheless, the decisions point out that even when post merger market shares remain relatively low, the acquisition may be anti-competitive when considering conditions of the relevant markets.

Statistical evidence, however, is not conclusive on this issue. Rather, it is necessary to conduct a further examination of the particular market in terms of its structure, history, and probable future, in order to judge whether there is a likely anticompetitive effect stemming from a merger. In making such an analysis, it is important to consider the level of concentration and tendency toward concentration in the industry, *see, Brown Shoe, supra,* 370 U.S. at 344, 82 S. Ct. at 1534, as well as the case of entry or barriers to entry into the relevant market. *See, United States Steel Corp. v. F.T.C.,* 426 F.2d 592, 605 (6th Cir. 1970).

In the instant case, the court finds that there is not merely an "ephemeral possibility" of an anticompetitive effect arising out of the proposed acquisition; rather, there is a distinct and significant probability that the proposed acquisition would harm competition in both the input and the output markets.

A. Input/Procurement Market

The evidence at trial demonstrated that the twelve state market for the procurement of fed cattle is highly concentrated. In 1982, the four largest firms accounted for 52% of the fed cattle slaughtered in the relevant geographic market. The two largest firms, IBP and Excel, accounted for 37.7% of the fed cattle slaughtered in the market. Ex. 74 (Pace Testimony, Table 6 and Table 7).

The evidence at trial further indicated a trend toward increased concentration in this market. Over the past five years, the four-firm ratio in the procurement market has increased from 37.3% to 52%. *Id.*

The proposed acquisition would further increase the high level of concentration in this market. The four-firm ratio in the procurement market would increase from 52% to 57.5% if Excel is permitted to acquire Spencer Beef. More significantly, following the completion of the proposed acquisition, Excel and IBP would have an estimated market share of 44.8% in the twelve state market for the procurement of fed cattle. *Id.*

The concentrated nature of this market and the potential effect of the proposed acquisition is also demonstrated by an analysis of the relative capacities of the firms in this market. The evidence indicated that firms are "efficient" if they have the capacity to slaughter at least 1,000 head of cattle per day. In fact, the testimony indicated that a plant is relatively inefficient unless it has a slaughter capacity of 1,200 to 1,500 head of cattle per day. T. Monfort; T. Neubauer (Ex. KKKKKKK at 3). An effective measure of market share, therefore, is a firm's capacity compared to the total capacity of all firms with the ability to slaughter over 1,000 head per day. In 1982, the four largest firms in the procurement market possessed 60.5% of the "efficient capacity" in the market. Ex. 74 (Pace Testimony, Table 10, Shares of Fed Cattle Slaughter Plants with Reported Capacities exceeding

1,000 Head a Day 12-State Area April 1983). This four firm ratio would increase to 68.4% if Excel acquires Spencer Beef. Furthermore, the proposed acquisition would result in Excel and IBP possessing 52.1% of the "efficient capacity" in the procurement market. *Id.*

Concentration levels and market share figures indicate that the proposed acquisition may realistically harm competition in the procurement market. This conclusion is further supported by the court's previous findings regarding the trend toward concentration in the procurement market.

B. Output/Sales Market

The evidence at trial also demonstrated a high level of concentration and a trend toward even greater concentration in the market for the sale of boxed beef. The four largest firms in the market accounted for 53.8% of the boxed beef produced by integrated slaughterer-fabricators and independent fabricators in 1982. Ex. 74 (Pace testimony, Table 3, Production of Boxed Beef by Five Largest Packers as a Percent of Estimated Total Production by Slaughterer-Fabricators and Independent Fabricators 1982). This four firm ratio would increase to 59.5% if Excel is permitted to acquire Spencer Beef. *Id.* More significantly, however, IBP and Excel would have a combined market share of 47.7% following completion of the proposed acquisition. *Id.*

The effect of the proposed acquisition can also be seen by analyzing the relative capacities of the firms in the relevant market. The four largest firms in the output market possessed 44.6% of the fabrication capacity within the output market in 1982. Ex. MMMMMMM (Burnett Testimony); Ex. KKKKK, Table C. This four firm ratio would increase to 49.2% if Excel is permitted to acquire Spencer Beef. *Id.* In addition, Excel and IBP would possess approximately 39% of the fabrication capacity in the relevant market following completion of the proposed acquisition.

The "capacity" share figures are even more indicative of the anticompetitive effect of the proposed acquisition if one calculates market shares with respect to the "efficient capacity" in the market. As noted above, firms are generally considered "efficient" if they have the capacity to fabricate the equivalent of at least 1000 head of cattle per day. In 1982, the four largest firms in the output market possessed 63.9% of the total capacity of all firms with the ability to fabricate at least 1000 head per day. Ex. 74 (Pace Testimony, Table 5). This four firm ratio would increase to 71.5% if Excel is permitted to acquire Spencer Beef. In addition, Excel and IBP currently possess 48.1% of the efficient capacity in the output market. If Excel is permitted to acquire Spencer Beef, Excel and IBP would have a total of 55.9% of the efficient capacity within the output market. *Id.*

Clearly, the concentration levels and market share figures delineated indicate that the proposed acquisition may harm competition in the relevant market for the sale of boxed beef. This conclusion is further supported by the statistical and non-statistical evidence discussed above regarding the trend toward concentration in the output market. Accordingly, the court finds that the plaintiff has made a prima facie showing that the proposed acquisition violates Section 7 of the Clayton Act.

C. Entry Barriers

A party seeking to enter one or both of the markets defined above could secure such entry by building new facilities or by acquiring facilities currently in existence. There are, however, significant entry barriers which would limit potential entrants regardless of whether they sought entry through new construction or acquisition.

Although testimony differed regarding the overall cost and time period associated with building new slaughter and fabrication facilities, the evidence indicated that such costs and time delays represent significant barriers to

entry into the relevant markets. Mr. Monfort testified that a minimally viable size for an integrated plant would be a plant with a capacity to slaughter and fabricate 1,500 head of cattle per day. Mr. Monfort further testified that construction of such a plant would cost approximately $40 million. In addition, Mr. Monfort stated that it would take three to six months to plan such a plant, and an additional year to construct the plant. Mr. Neubauer, on the other hand, testified that a plant would be viable if it had the capacity to slaughter and fabricate 1,200 head per day. Mr. Neubauer estimated that it would cost approximately $20 million to build such a plant, and the planning and construction of the plant could be completed within twelve to eighteen months. Mr. Neubauer further testified that an independent slaughter or fabrication facility would cost approximately $10 million. Ex. KKKKKKK (Neubauer Testimony, ¶¶ 10-13, 16, 30).

The court rejects defendants' contention that these costs and delays do not constitute barriers to potential entrants into the relevant markets. Defendants' internal documents amply support the proposition that the large capital costs needed for entry into the market, combined with the previously discussed low profit margins in the beef industry, represent formidable barriers to new entrants.

> We do not anticipate any increase in competition within the foreseeable future for two reasons: poor profitability within the business, and large capital requirements needed for new plant and equipment.

Ex. 70 (MBPXL LRPC Report, January 25, 1982).

Significant barriers also restrict entrance into the relevant markets by firms seeking to acquire existing facilities. Initially, the court notes that substantial refurbishing costs typically face any firm seeking to acquire such facilities. More significantly, however, the evidence at

trial indicated that the lack of available facilities is also a limit on entry through acquisition. T. Monfort. The testimony is in conflict on this point in that Mr. Neubauer testified that there are numerous facilities available for acquisition. The defendants' own documents, however, indicate the lack of such facilities. In this regard, Excel's internal memoranda clearly indicate that it decided to acquire the Spencer Beef plants, in part, because they are the only viable integrated facilities available within the twelve state procurement market. Ex. 30 at 7. (Changes in the Beef Packing Industry, Notes for Caprock Annual Meeting, June 24, 1983).

We are persuaded that both the lack of facilities and the cost associated with refurbishing old facilities constitute significant barriers to any party seeking to enter the market by acquiring existing facilities.

There are additional factors which serve as barriers for entry into the input and output markets. Mr. Monfort testified that even if one can finance the costs of initial construction or acquisition, the industry is such that it takes a substantial amount of time to achieve even a minimum level of market penetration. In addition, there are "psychological" barriers to new entrants arising out of the high level of concentration in the beef industry. Ex. 16 at 7 (MBPXL LRPC Report, January 1981). Although these factors, standing alone, do not constitute absolute entry barriers, they certainly restrict access to the input and output markets.

The evidence at trial indicated that there has been just one major entrant into the two relevant markets in recent years, the Val-Agri Company. In March 1983 Val-Agri entered the industry by purchasing existing plants in Garden City, Kansas and Amarillo, Texas. There are conflicting estimates regarding the overall cost incurred by Val-Agri in acquiring and refurbishing its plants. Nevertheless, it appears that the total price was at least $25 million.

We are not persuaded that Val-Agri's entry into the beef industry indicates a lack of significant entry barriers. Initially, the court notes at this time Val-Agri has yet to commence full operations. Therefore, it is difficult to assess its impact within the two relevant markets. More significantly, however, the court notes that Val-Agri entered the industry through acquisition of existing facilities. As we mentioned above, defendants' own documents indicate a lack of additional viable plants available for acquisition within the relevant markets.

We also note that the meat packing industry, as it relates to the issues in this case, may be characterized as a mature industry. No substantial changes in the industry can be expected. T. Monfort. Greater automation or use of processing robots are not anticipated in the foreseeable future. Thus, a new entrant into the market will be unable to acquire market power by developing or adopting new processing techniques. Rather, the mature nature of the industry will enhance the ability of the current industry leaders to continue their domination of the input and output markets described above.

D. The Size of the Acquiring Entity

The size of the acquiring and acquired entities is a relevant factor in assessing the likely effect of a proposed acquisition. *Kennecott Copper Corp. v. F.T.C.*, 467 F.2d 67, 68 (10th Cir. 1972), *cert. denied*, 416 U.S. 909, 94 S. Ct. 1617, 40 L.Ed.2d 114 (1974); *see also Reynolds Metals Co. v. F.T.C.*, *supra*, at 229. In *Kennecott*, *supra*, the Court of Appeals for the Tenth Circuit explained the importance of considering the potential effect of an acquisition involving parties with great financial resources:

> Kennecott takes strong exception to the Commission's consideration of the anti-competitive effect of its great financial resources . . . . The Commission reasoned that it was likely that this "deep pocket" of

> funds would be employed to acquire vast coal reserves and massive mining developments to enable Kennecott to compete for long-term utility supply contracts and thus to gain more market share . . . .
>
> It was reasonable for the Commission to conclude that Kennecott would use its immense resources to gain for Peabody, already the number one producer in the industry, an even larger share of a market which promises to be a concentrated one in a relatively short time.

Id. at 79.

The court is aware that *Kennecott* involved the merger of two large corporations with tremendous resources, while the instant case involves one large corporation acquiring a relatively smaller operation. However, the analysis used by the court in *Kennecott* is applicable in this case as well because the proposed acquisition would result in the beef industry being dominated by two corporate giants, Cargill and Occidental Petroleum Corporation.

As noted, defendant Excel is a wholly owned subsidiary of Cargill. In fiscal year 1981-82, Cargill, Inc. reported annual sales in the billions of dollars. (See sequestered Appendix A filed with the Clerk of the Court.) In addition, Cargill, as Excel's parent, financed a great deal of Excel's recent growth. Ex. 17 (MBPXL LRPC Report, April 1981); Ex. 31 (Commitment Request, Feb. 28, 1983 and Cargill memo from W. Watson to Finance Comm., Feb. 28, 1983). In fact, Excel was able to enter into the proposed acquisition, in part, because Cargill unconditionally guaranteed Excel's performance and payment of a multi-million dollar sum under the acquisition agreement. Ex. 3 at 30 (Asset Purchase and Sale Agreement, June 17, 1983).

Of considerable import is the fact that IBP, the acknowledged market-share leader in both relevant markets

is a wholly owned subsidiary of another corporation with tremendous financial resources, Occidental Petroleum Corporation. Ex. 65 at Doc. I.D. No. 1507.

The proposed acquisition, as discussed above, would result in both relevant markets being dominated by IBP and Excel. The enormous financial resources available to these two firms lends further support to the conclusion that the proposed acquisition would tend to harm competition in both the input market and the output market.

It is clear for the reasons outlined that the proposed acquisition would tend to harm competition in the regional market for the procurement of fed cattle and the national market for the sale of boxed beef. Accordingly, the court finds that the proposed acquisition violates Section 7 of the Clayton Act.

VII. IMPACT OF PROPOSED ACQUISITION ON MONFORT OF COLORADO

Section 16 of the Clayton Act authorizes injunctive relief against injuries threatened by activities that violate the antitrust laws. 15 U.S.C. § 26. In our earlier discussion regarding Monfort's standing to sue under Sections 7 and 16 of the Clayton Act, we found that Monfort had *alleged* the likelihood of an antitrust injury sufficient to satisfy the standing requirements developed by the Supreme Court in *Brunswick*, *supra*, and *Associated General Contractors*, *supra*.

As the Supreme Court has noted, a plaintiff seeking injunctive relief need only show that an injury is threatened as a result of defendants' anticompetitive conduct which violates the antitrust laws, *Zenith Corp.*, *supra*. Under Section 16 the plaintiff must show that a significant threat of injury exists and that the injury is causally or proximately linked to defendants' anticompetitive conduct. 15 U.S.C. § 26; *United States v. Borden Co.*, 347 U.S. 514, 74 S. Ct. 703, 98 L.Ed. 903 (1954); *Cal-*

netics v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S. Ct. 355, 50 L.Ed.2d 309 (1976); *Industrial Communications Systems, Inc. v. Pacific Telephone and Telegraph Co.*, 505 F.2d 152 (9th Cir. 1974).

While the injury complained of must be personal to the plaintiff it need not be an injury to the plaintiff's business or property, as is the case where treble damages are sought under Section 4 of the Clayton Act, 15 U.S.C. § 15. In addition, because treble damages are not a possibility the injury requirement under Section 16 is arguably less of a factor than under Section 4 of the Clayton Act.

It is our view that the plaintiff has established a substantial and significant threat of injury personal to itself if the planned acquisition is permitted to go forward. Further, the plaintiff has shown that the prospective injury is causally or proximately related to the defendants' planned acquisition of Spencer Beef. We have earlier determined that the proposed acquisition is violative of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Plaintiff maintains that the planned acquisition will place it in a position such that it will be unable to remain a viable competitor in the beef slaughtering and fabrication industry. Monfort contends that it will be driven out by the impact of heightened competition between Excel and IBP in their quest for increased market share. It is Monfort's position that the increased market share desired by Excel will come at the expense of smaller operators such as Monfort rather than at the expense of IBP. Indeed Excel's internal memoranda reveal the intensity of Excel's quest for a greater share of the market:

> It is critical that we grow in market share during the present instability in the beef processing industry. We must gain shares from the leader (IBP) and inhibit the smaller processor's share.

Exhibit 24 at 4 (Excel LRPC Report, January 24, 1983). This document emphatically supports Monfort's argument that Excel plans to take steps to manipulate the market in an effort to inhibit small processors and acquire an increased market share.

While Monfort does not allege that IBP and Excel will in fact engage in predatory activities as part of the cost-price squeeze, the market shares that would exist following the acquisition, coupled with the acknowledged difficulties in acquiring greater market share by other methods make such practices a distinct possibility. The likelihood of predatory pricing is heightened by the vast financial resources available to both Excel and IBP, resources not available to the plaintiff.

Monfort is realistically threatened with a significant injury personal to itself. Moreover, the threatened injury is proximately related to the violation of Section 7 of the Clayton Act that would result from Excel's planned acquisition of Spencer Beef. Unlike the situation in *Brunswick, supra*, the threat to Monfort would not exist if another entity, other than Excel or IBP, planned to acquire the assets of Spencer Beef.

We find that Monfort has satisfied the prerequisites necessary to seek injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26.

VI. CONCLUSION

The court finds that the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the regional market for the procurement of fed cattle and in the national market for

the sale of boxed beef. Therefore, the proposed acquisition violates Section 7 of the Clayton Act.

The proposed acquisition would also result in a significant threat of irreparable injury to Monfort of Colorado and to the public interest. The plaintiff has satisfied the requirements under Section 16 of the Clayton Act and is entitled to injunctive relief pursuant to that section. The acquisition of Spencer Beef by the defendants will be permanently enjoined.

Given the court's finding with respect to Section 7 of the Clayton Act, the court does not reach or decide the question of whether the proposed acquisition violates Section 1 of the Sherman Act.

The court also finds that the plaintiff is entitled to an award of costs and reasonable attorney's fees pursuant to 15 U.S.C. § 26. Plaintiff's complaint contains a claim for costs and attorney's fees, and the plaintiff has substantially prevailed on its claim. Accordingly, the plaintiff is entitled to an award of costs and reasonable attorneys' fees.

ORDER

IT IS HEREBY ORDERED that defendants Excel Corporation and Cargill, Inc. are PERMANENTLY ENJOINED from consummating the proposed acquisition between Excel Corporation, Cargill, Inc., and the Spencer Beef Division of Land O'Lakes, Inc. The defendants are further ENJOINED from undertaking any plan or entering into any agreement, the effect of which would be to allow the acquisition, merger, consolidation, operation or in any other way permit the combination of the ownership or operation of the beef packing businesses of defendants and the Spencer Beef Division of Land O'Lakes, Inc. Judgment will enter for Plaintiff Monfort of Colorado on its claim for injunctive relief.

IT IS FURTHER ORDERED that plaintiff Monfort of Colorado, as a prevailing party, is entitled to an award

of costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 26. The Court will enter additional orders at a later date regarding the award of attorneys' fees.

Accordingly, the Clerk of the Court is hereby DIRECTED to enter judgment in favor of plaintiff, Monfort of Colorado, and against the Defendants, Cargill, Inc. and Excel Corporation, on plaintiff's complaint for injunctive relief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

MARCH TERM—APRIL 23, 1985

Before Honorable James K. Logan, Honorable Jean S. Breitenstein and Honorable Robert H. McWilliams, Circuit Judges.

Nos. 83-2588—84-1305

MONFORT OF COLORADO, INC.,
Plaintiff-Appellee,
vs.
CARGILL, INC. and EXCEL CORPORATION,
Defendants-Appellants.

(D.C. No. 83-F-1318)

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-F-1318

MONFORT OF COLORADO, INC.,
Plaintiff,
vs.
CARGILL, INC. and EXCEL CORPORATION,
Defendants.

[Filed Dec. 1, 1983]

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order dated and signed December 1, 1983, by the Honorable Sherman G. Finesilver, District Judge, it is

ORDERED AND ADJUDGED that judgment be entered in favor of plaintiff and against the defendants on plaintiff's complaint for injunctive relief. It is,

FURTHER ORDERED that the plaintiff shall have its costs upon the filing of a Bill of Costs with the Clerk of this Court within ten (10) days after entry of this judgment.

DATED at Denver, Colorado, this 1st day of December, 1983.

FOR THE COURT:
JAMES R. MANSPEAKER
Clerk

By: /s/ Stephen P. Ehrlich
STEPHEN P. EHRLICH
Chief Deputy Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-952

CARGILL, INC. and EXCEL CORPORATION,
Applicants,
v.

MONFORT OF COLORADO, INC.,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 20, 1985.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 21st
day of June, 1985.

APPENDIX F

15 U.S.C. § 18

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches

or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock o fa branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section, shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transaction duly consummated pursuant to authority given by the Secretary of Transportation, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Com-

mission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission or Secretary.

15 USC § 26

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

OPPOSITION BRIEF

5

No. 85-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. and EXCEL CORPORATION,
Petitioners,
v.
MONFORT OF COLORADO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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November 22, 1985

Merrill/Chicago • 372-2800

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that there was an adequate factual basis for the district court's conclusion that Section 7 of the Clayton Act would be violated by the nation's second largest beef packer's proposed acquisition of the third largest beef packer, which would result in presumptively anticompetitive market shares in an industry characterized by a trend toward concentration and high entry barriers?

2. Did the court of appeals correctly hold that a competitor has standing to seek injunctive relief against a proposed acquisition, where the resulting increase in concentration would enable the industry's leaders to engage in practices that would threaten the competitor's survival?[1]

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1. Pursuant to Supreme Court Rule 28.1, respondent Monfort of Colorado, Inc. states that it has no parent companies, partially owned subsidiaries, or affiliates.

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No. 85-473

IN THE

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CARGILL, INC. and EXCEL CORPORATION,
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v.

MONFORT OF COLORADO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Monfort of Colorado, Inc. ("Monfort") respectfully requests that this Court deny the petition for writ of certiorari filed by petitioners Cargill, Inc. and Excel Corporation (collectively referred to as "Excel"), seeking review of the opinion of the Tenth Circuit Court of Appeals in this case.[2]

STATEMENT OF THE CASE

In the interest of brevity, Monfort adopts the majority of Excel's statement of the case for purposes of this brief in opposition only. However, Monfort notes the following significant errors in and omissions from Excel's statement of the case:

2. On October 16, 1985, the Clerk of this Court granted Monfort's request to extend the time within which to file this brief to and including November 22, 1985.

1. Although Excel indicates that Monfort, Excel, and the Spencer Beef Division of Land O'Lakes, Inc. ("Spencer") are all large beef packing firms, the petition does not make clear that Excel is the nation's second largest beef packer and Spencer, which Excel sought to acquire,[3] is the third largest beef packer. Monfort ranks as the fifth largest beef packer in the United States. App. 2a, 26a-27a.

2. Excel's statement of the case fails to focus on the two most significant developments in the beef packing industry during the past quarter century. First, boxed beef was introduced in the 1960's. In the past twenty years, boxed beef has come to dominate the industry, now accounting for over 80% of all table cuts of beef purchased by retail supermarkets and the hotel, restaurant and institutional trade. App. 29a-30a. Second, in a much shorter period of time, the beef packing industry has experienced a marked trend toward concentration, and with it, domination by the two largest firms: IBP, Inc.[4] and Excel. Significantly, Excel's growth has been largely through acquisition rather than internal expansion. Most importantly, the rise of these two firms has been coupled with the demise of a multitude of smaller packing companies. Between 1978 and 1982 alone, the four-firm market share in the market for the procurement of fed cattle (the "procurement market") rose from 37.3% to 52%. App. 62a. If the acquisition had occurred, the four-firm market share figure in the

3. The district court permanently enjoined the acquisition. In its Brief for the United States as Amicus Curiae, the Department of Justice ("DOJ") indicates that subsequently Land O'Lakes sold the Spencer plants to a third party but that Excel retains a contingent interest in Spencer. DOJ Br. 15 n.24. DOJ seems to suggest that this case may be moot or, in the alternative, that Excel may be in violation of the district court's permanent injunction forbidding Excel from " . . . entering into any agreement, the effect of which would be to allow the acquisition, merger, consolidation, operation or in any other way permit the combination of the ownership or operation of the beef packing businesses of [Excel] and [Spencer]." App. 72a.

4. IBP, a subsidiary of Occidental Petroleum Corporation, is the largest beef packer in the United States. App. 27a. IBP is not a party in this case.

procurement market would have risen to 57.5%. *Id.* Using efficient slaughtering capacity (ability to slaughter over 1,000 head per day) as a measure of market share, the four-firm concentration ratio in 1982 was 60.5%, and that figure would have increased to 68.4% had Excel acquired Spencer. *Id.* at 62a-63a. In the market for the sale of boxed beef (the "output market"), the acquisition would have increased the four-firm concentration ratio from 53.8% to 59.5%. *Id.* at 63a. Using efficient fabrication capacity (the ability to fabricate the equivalent of 1,000 head per day) as a measure of market share, the four-firm concentration ratio in 1982 was 63.9% and would have increased to 71.5% had the acquisition been permitted. *Id.* at 64a. Significantly, after the acquisition, Excel and IBP would have controlled 44.8% of the procurement market and 47.7% of the output market. *Id.* at 62a-63a. Moreover, they would have controlled 52.1% of the efficient capacity in the procurement market and 55.9% of the efficient capacity in the output market. *Id.* at 63a-64a.[5]

3. Excel frequently claims that the district court "ignored" or "gave no weight to" particular evidence and testimony. *See, e.g.*, Pet. 7, 9. In fact, the trial court carefully weighed conflicting evidence and testimony, and ultimately explained its conclusions concerning witness credibility as follows: having "endeavored to determine those opinions which represent the more probable state of events and the relative weight to be given each . . . the court found the experts who were called by Monfort to be particularly persuasive in that they emphasized the actual conditions in the

5. The concentration figures that Excel uses are inaccurate to the extent that they measure concentration in markets that the district court expressly rejected as overly broad. Specifically, Excel provides four-firm concentration ratios advanced by its experts for markets "defined to include those firms in the beef industry that would buy fed cattle or sell beef as a result of a five percent change in the price of those products." Pet. 8. Excel does not state that the district court declined to adopt those market definitions. App. 42a-46a, 52a-59a. Thus, the concentration ratios in those markets are irrelevant.

marketplace as well as the theoretical implications of the proposed acquisition." App. 41a-42a.

4. Excel does not describe accurately Monfort's threatened injury as a result of the proposed acquisition. Monfort did not assert, and the lower courts did not find, that its injury rested on "increased" or "heightened" competition. Pet. 3, 10, 11, 13, 16. Rather, Monfort demonstrated that the acquisition threatened it with precisely the type of harm Section 7 of the Clayton Act is designed to prevent. Monfort established that the beef packing industry is mature, with little potential for growth, small profit margins, and significant barriers to entry. App. 27a, 64a-67a. Following the acquisition, the industry would be dominated by two entities, IBP and Excel, who together would control 52.1% of the efficient capacity within the procurement market and 55.9% of the efficient capacity within the output market. App. 63a-64a. As the Tenth Circuit recognized, Monfort demonstrated that the two industry giants probably would engage in a struggle with each other for market share by employing practices that ultimately would drive smaller processors out of business:

> Monfort claims that Excel will be able to engage in what we consider to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers. The resulting cost-price squeeze will, according to Monfort, reduce its profit margin and drive it and other companies out of business. Once that occurs Excel will then use its market power to charge monopoly prices for its beef. Thus, according to Monfort, the harm to competition will follow an intense, but ersatz, period of competition during which Excel will increase its market share. Although Monfort does not discuss less drastic results, it is also possible that such a pricing strategy could enable Excel to demonstrate its price leadership to its competitors and force them to follow its artificially high boxed beef prices. Such a result would probably help Monfort but hurt competition by promoting tacit collusion. Monfort contends that Excel would be better able to engage in such a sustained period of predatory pricing if it possessed the additional market power that would come with increased market share following acquisition of Spencer Beef. Thus it claims that the harm to competition, as well as the injury it will suffer as a competitor, is directly tied to the putative Clayton Act section 7 violation.

App. 7a-8a. *See also* App. 31a-33a. Monfort established, and both courts below found, that Monfort's injury "is directly related to the planned acquisition." App. 34a.

5. Excel suggests that the lower courts gave undue weight to Cargill's large assets in concluding that the acquisition violates Section 7. *E.g.*, Pet. 3, 9. Excel neglects to mention, however, that the record amply documents Cargill's past infusions of capital into Excel, including Cargill's unconditional guarantee of Excel's payment to Land O'Lakes of a multi-million dollar sum under the acquisition agreement. *E.g.*, Ex. 3 at 30 (Asset Purchase and Sale Agreement, June 17, 1983); Ex. 31 (Excel Commitment Request, March 4, 1983). Because Cargill's assets were critical to Excel's ability to enter into the challenged acquisition, as well as to survive the struggle with IBP for increased market share, the district court and the Tenth Circuit properly considered them in assessing the legality of the acquisition.

6. Excel implies in its petition that the federal antitrust enforcement agencies approved the proposed transaction. Pet. 22. In fact, DOJ made it clear to all parties that it had not reached any determination regarding the legality of the acquisition:

> [T]he closing of our investigation should not in any way be construed as a judgment as to the lawfulness of this transaction. Also, you should know that the

existence of a private suit challenging the acquisition is a factor in our decision not to take an enforcement action at this time, and that the court's findings could result in a reevaluation of our position in this matter.

Letter from Alan L. Marx, Chief, General Litigation, Antitrust Division of Department of Justice, to James D. Moe, Cargill, Inc. (Oct. 25, 1983).[6]

7. Finally, Excel's statement of the case makes no mention of the numerous internal reports and memoranda written by Excel and Cargill themselves. These materials support Monfort's case on every significant issue, from procurement market definition[7] to output market definition[8] to market

6. DOJ acknowledges that "this letter could be read to suggest that the government terminated its investigation in reliance on the ability of a private party to undertake an appropriate enforcement action." DOJ Br. 2 n.1. Indeed, the plain language of the letter precludes any other reading. In fact, the letter highlights the untenable nature of DOJ's current position. Having closed its investigation on grounds that a private enforcement action was pending, DOJ now seeks to vacate the outcome of that proceeding, not on the basis of the substantive result, but because it allegedly was brought by the "wrong" party.

7. *E.g.*, Ex. 15 at 1 (MBPXL Annual Report, 1980-81) ("the non-fed sector . . . is not a part of MBPXL supply potential").

8. *E.g.*, Ex. 12 at 4 (Excel Long Range Planning Comm. Report, Jan. 21, 1980) ("[I]t is not a matter of if, but a matter of when the processor puts all or just about all of the cattle in a box."); Ex. 9 at 12 (Cargill Report, Apr. 24, 1979) ("The lack of credit, high freight costs and high labor costs will have virtually eliminated the independent fabricators by 1982 and 1983.").

share data[9] to concentration trends[10] to barriers to entry.[11] Prepared well before the filing of this lawsuit, these documents — on which the trial court relied extensively — provide the truest picture of the commercial realities underlying the proposed acquisition, as well as compelling support for the conclusions of the lower courts that Excel asks this Court to overturn.

REASONS WHY THE WRIT SHOULD BE DENIED

In seeking certiorari, Excel claims that the decisions below reflect a need for articulation of (1) the "legal standards" for market definition and analysis of entry barriers under Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982) ("Section 7"), and (2) the type of injury a competitor must allege to mount a Section 7 challenge to a proposed merger of two of its rivals. Monfort respectfully submits that this Court's existing precedents amply furnish the guidance Excel requests. Moreover, the lower courts faithfully adhered to those precedents in this case and Excel has advanced no meritorious reason — in law or in policy — for this Court to

9. *E.g.*, Ex. 19 at 5 (MBPXL Annual Report, 1981-82) ("[IBP] slaughters . . . about 25% of the fed steer and heifer kill in the United States. They fabricated . . . about 42% of the packer-produced boxed beef market in this country. We are a margin less than half their size — with 10% of the fed cattle slaughter and 20% of the packer-produced boxed beef market.").

10. *E.g.*, Ex. 15 at 4 (MBPXL Annual Report, 1980-81) ("The industry is steadily concentrating into strongest hands and the days of picking up market shares from the majors for the asking are over.").

11. *E.g.*, Ex. 16 at 7 (MBPXL Long Range Planning Comm. Report, Jan. 1981) ("[I]t is this very fact — a tough and complicated business in the midst of structural change — that makes entry of new competition unlikely."); Ex. 70 at 3 (MBPXL Report to the Long Range Planning Comm., Jan. 25, 1982) ("We do not anticipate any increase in competition within the foreseeable future for two reasons: poor profitability within the business, and large capital requirements needed for new plant and equipment.").

re-examine or modify those precedents. For all these reasons, the petition should be denied.

1. Excel's claim that this Court should furnish legal standards in the areas of market definition and entry barriers ignores the existing comprehensive body of decisions in those areas. The issues raised by the petition are far from novel. Rather, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and its progeny, this Court has provided the very standards that Excel asks the Court to adopt.[12] Both courts below dutifully applied those standards. Thus exposed, the petition amounts to no more than a challenge to the fact findings of the district court, which surely does not merit this Court's review on certiorari.

2. Excel's attack on the standing decisions of the lower courts relies on a fundamental mischaracterization of the nature of Monfort's injury. Despite Excel's repeated assertions to the contrary, Monfort's threatened harm does not flow from increased competition but rather from the increased concentration the acquisition would yield, and the resulting threat of anticompetitive practices by the industry leaders. One example of such anticompetitive practices is the probable cost-price squeeze established at trial. *See supra* at 4-5. Thus, Excel's claim of error is groundless: Monfort demonstrated the type of injury that this Court's decisions require and the lower courts properly applied those decisions in upholding Monfort's standing.

Moreover, by seeking to engraft a "collusion" or "predation" requirement onto the antitrust standing analysis, Excel proposes a drastic departure from this Court's prior holdings. Excel asks the Court to hold that, absent proof of an imminent Sherman Act violation, a competitor never may maintain a Section 7 action for injunctive relief. As the trial court noted in rejecting Excel's argument, "[t]he position of the

12. DOJ concurs that "[t]he general standards for making out a violation of Section 7 have been established by this Court" and "[r]eview of that aspect of the decision . . . is not needed. . . . " DOJ Br. 18.

defendants, if accepted, would eliminate private enforcement of Section 7." App. 39a. Because this Court's precedents fully address Excel's alleged concerns, and because Excel's approach to standing would bar virtually all private challenges to even concededly anticompetitive mergers, the petition for certiorari should be denied.

3. As the district court expressly noted, the issues in this case are "unique to the beef industry." App. 24a. Two courts already have given the proposed acquisition, and its impact on the beef packing industry, the searching inquiry Excel seeks in this Court. None of the issues presented is national in scope or likely to recur and all of them have been resolved in accordance with this Court's existing decisions. Hence, they do not warrant review on certiorari.

4. DOJ's amicus brief furnishes no valid reason why this Court should grant Excel's petition. Despite its critique of the lower courts' analysis of the Section 7 violation, DOJ does not seek review of the substantive conclusion that the proposed acquisition violates Section 7. DOJ Br. 6. Yet in a bold elevation of form over substance, DOJ asks this Court to ignore the antitrust merits of the lower courts' decisions below and decide on policy grounds that Monfort, as a competitor of Excel, cannot sue to block a plainly anticompetitive acquisition.

DOJ echoes Excel's contention that competitors by definition lack standing to challenge a merger of their rivals and, accordingly, have virtually no protection whatsoever under Section 7. *See* DOJ Br. 8. In making this argument, DOJ avoids any discussion of the purpose and meaning of Section 7. Instead, it advocates a wholesale incorporation of the Sherman Act into the antitrust standing inquiry. Under that approach — which, thus far, no court has adopted — no private plaintiff could challenge a merger under Section 7 unless the acquisition violates Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982) ("Section 2"), as well. DOJ Br. 11 ("[T]he plaintiff should be required to establish, at a minimum, that after the merger the new firm will have a dominant market

share that at least creates a dangerous probability that unilateral predation by that firm will be successful.").

Like Excel, DOJ cites no authority for its position: it is patently inconsistent with Section 7, its legislative history, and this Court's rulings that Section 7 is an "incipiency" statute intended to prohibit anticompetitive acquisitions before they rise to the level of Sherman Act violations. For the reasons set forth below, DOJ's position is as untenable as Excel's and, therefore, does not justify review on certiorari.

I. CERTIORARI IS INAPPROPRIATE WHERE THE TRIAL COURT'S FINDING THAT THE PROPOSED ACQUISITION WOULD VIOLATE SECTION 7 WAS SUPPORTED BY AMPLE EVIDENCE AND WAS CONSISTENT WITH THIS COURT'S ESTABLISHED SECTION 7 ANALYSIS.

Excel limits its challenge regarding the substantive Section 7 violation to an attack on the lower courts' analysis of future market behavior and the likely effect of such future conditions on the anticompetitiveness of the proposed acquisition. Excel contends first that the trial court's market definitions were flawed because no account allegedly was taken of possible future market conditions that could expand the size of both the procurement and output markets. Pet. 26-27. It further alleges that the lower courts' evaluation of entry barriers failed to consider the likelihood of new entry in the future. *Id.* at 27-28.

Neither of these arguments provides any reason for this Court to exercise its extraordinary power of review on certiorari. First, there is nothing distinctive about the issues identified in the petition: this Court previously has described the proper consideration of expected future market behavior in the context of the overall Section 7 analysis. Second, the trial court followed that analysis and, in fact, expressly considered the various factors that Excel claims were ignored. Third, the trial court's market definitions and findings concerning entry barriers constitute findings of fact — not reversible unless

clearly erroneous and certainly not worthy subjects of this Court's consideration on certiorari. Finally, to the extent that Excel's claims of error rest on a view that collusion or predation is an essential element of a Section 7 violation, its theory lacks any statutory or jurisprudential basis.

1. As early as its decision in *Brown Shoe,* this Court ruled that "the very wording of § 7 requires a prognosis of the probable *future* effect of the merger." *Brown Shoe,* 370 U.S. at 332 (emphasis in original). Market definitions and entry barrier evaluations must include a forecast as to how the markets reasonably would respond to anticompetitive conditions produced by the acquisition. On the other hand, idle speculation, unsupported by commercial realities, has no bearing on the Section 7 analysis. *See United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 359-60 (1963) ("*Theoretically,* we should be concerned with the possibility that bank offices on the perimeter of the area may be in effective competition with bank offices within; *actually,* this seems to be a factor of little significance.") (emphasis added). Rather, in defining markets and assessing a merger's likely effect on competition, courts correctly limit their consideration of future market behavior to what is reasonable under all the circumstances in the particular industry involved. Thus, Excel's assertion that guidance is needed in these areas is without merit and merely camouflages its desire to have this Court review the factual findings below.

2. Contrary to Excel's contentions, the district court carefully considered likely future market conditions in the beef packing industry. Excel focuses on the court's alleged preoccupation with conditions in the current competitive market instead of the anticompetitive conditions that the proposed acquisition would yield. In fact, the trial court assessed the present operation of the markets as a predicate to its findings of how the markets would be likely to respond if market power were exercised anticompetitively in the future. *See* App. 44a-46a, 50a-51a, 57a-59a. The district court correctly rejected Excel's speculative theories as to market

behavior and instead "adopt[ed] a realistic view of the market and focus[ed] on how manufacturers [and the market] actually would react in a situation as well as how they could react." *Id.* at 58a.[13]

3. Excel faults the court of appeals for its alleged failure "to consider the principles" that guide market definition and entry barrier evaluation, and to instruct the trial court accordingly. Pet. 25. What Excel does not recognize is that the Tenth Circuit approved the district court's wholly proper statement of the inquiry as to these issues. The court of appeals correctly observed that the trial court's findings of relevant markets and substantial entry barriers are not reversible unless clearly erroneous. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974); *Int'l Boxing Club* v. *United States*, 358 U.S. 242, 251 (1959). After its review of the record, the Tenth Circuit concluded that the trial court's findings were not clearly erroneous and, accordingly, affirmed those findings. App. 15a.

4. Underlying Excel's discussion regarding the substantive antitrust violation is its erroneous view that Section 7 requires a showing of imminent oligopoly pricing or other predatory behavior. *See, e.g.*, Pet. 25, 29 n.27. Excel simply refuses to acknowledge that Section 7 was enacted and later amended as an "incipiency" statute, intended to prevent "undue concentration" in and of itself. *Philadelphia Nat'l Bank*, 374 U.S. at 363. The economic sources that Excel cites may question the wisdom of this policy, but this Court properly has rejected similar "current economics" arguments in the past:

13. Significantly, over Monfort's objection, the district court expanded the relevant product submarket in the output market to include "the capacity of current producers of boxed beef to increase their production in response to an increase in the price of boxed beef." App. 59a. In so doing, the court accepted Excel's contention that current boxed beef producers would be reasonably likely to expand production in the event of future anticompetitive market conditions.

> [Congress] passed and amended § 7 on the premise that mergers do tend to accelerate concentration in an industry. Many believe that this assumption of Congress is wrong, and that the disappearance of small businesses with a correlative concentration of business in the hands of a few is bound to occur whether mergers are prohibited or not. *But it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden.* . . .

United States v. *Pabst Brewing Co.*, 384 U.S. 546, 552 (1966) (emphasis added). In asking this Court to adopt a collusion or predation element as part of the Section 7 inquiry, Excel requests the Court to assume a legislative role inconsistent with its constitutional mandate. If Congress wishes to equate a Section 7 violation with a violation of the monopolization and restraint of trade provisions of the Sherman Act, it is of course free to do so.[14] Unless and until it takes that step, however, this Court must apply Section 7 consistent with its drafters' original intent.

This Court need only review the district court's decision on the merits of the Section 7 violation, including its thorough documentation of its findings, to know that the court of appeals' deference to the trial court's fact findings was proper. Moreover, it is well established that this Court does not grant certiorari to review evidence and findings of fact. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). That being the sole issue presented by Excel with respect to the merits of the Section 7 violation, this Court should deny the petition.

14. Indeed, Commerce Secretary Malcolm Baldrige has proposed that Congress repeal Section 7, thereby permitting all acquisitions except those that violate Section 2 of the Sherman Act. *See* 49 *Antitrust & Trade Reg. Rep.* (BNA) at 665 (Oct. 17, 1985). The merits of the Baldrige proposal are not pertinent to this Court's consideration of Excel's petition. What is relevant is that Secretary Baldrige — unlike Excel — understands that only Congress has the power to amend or repeal Section 7.

II. CERTIORARI IS INAPPROPRIATE WHERE A COMPETITOR'S THREATENED INJURY FINDS ABUNDANT SUPPORT IN THE EVIDENCE AND IN THIS COURT'S ANTITRUST STANDING DECISIONS.

Excel's attack on Monfort's standing is based on its mistaken view that Monfort's threatened injury flows from increased competition. That error is compounded by Excel's failure to acknowledge this Court's antitrust standing decisions and the lower courts' proper application of those decisions. Specifically, Excel's dogged insistence that a competitor show imminent predatory or collusive activity by its merging rivals finds no support in either Section 7 or this Court' precedents. Finally, Excel's purported fear of a deluge of abusive Section 7 actions is neither realistic nor a valid basis for erecting artificial barriers to competitor standing.

1. Throughout the petition, Excel asserts that Monfort's standing is based on a threat of increased competition following the acquisition. *E.g.*, Pet. (i), 3, 12, 13. Excel's assertion is no more than a smokescreen fashioned to support its argument that *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), precludes Monfort from maintaining this suit. In *Brunswick*, one of the nation's largest bowling equipment manufacturers and operators of bowling centers acquired six bowling centers that had defaulted on loans for the purchase of the manufacturer's equipment. Several other bowling centers sued the manufacturer for treble damages, claiming that the acquisitions had injured them by reducing the profits they would have earned had the acquired centers been permitted to close. In essence, the claimants sought to use the antitrust laws as a haven from the increased competition that the manufacturer's acquisitions brought to the industry. This Court had no trouble concluding that because the claimants' damage theory "divorce[d] antitrust recovery from the purposes of the antitrust laws," *id.* at 487, they had no standing to pursue their treble damages claim.

In contrast, as both courts below recognized, Monfort's threatened harm flows directly from the breakdown of com-

petition that the acquisition would cause. Following the acquisition, Spencer would be eliminated as a competitor and the already mature beef packing industry would be dominated by two giants, IBP and Excel. As each of the giants pursued an ever larger share of the market by engaging in activities such as the cost-price squeeze Mr. Monfort described at trial, *see supra* at 4-5, smaller firms, like Monfort, would find it increasingly difficult to survive on ever shrinking profit margins. Ultimately, they would fail and exit the market, leaving IBP and Excel to recoup the losses they sustained during the cost-price squeeze, without any effective competition to restrain price hikes. But for Excel's acquisition of Spencer, Excel would not have had the market position or the resources to engage in and to survive the struggle with IBP for market dominance, which in turn threatened not only "to inhibit" but to destroy "the smaller processor's share" Ex. 24 at 4 (Excel Long Range Planning Comm. Report, Jan. 24, 1983). As the *Brunswick* Court recognized, "competitors may be able to prove antitrust injury before they are actually driven from the market and the competition is thereby lessened." 429 U.S. at 489 n. 14. Hence, there can be no question that the acquisition threatened Monfort with "injury of the type the antitrust laws were intended to prevent and that which flows from that which makes defendants' acts unlawful." *Id.* at 489.

2. Despite Excel's futile attempt to rely on *Brunswick*,[15] the petition is strikingly devoid of a meaningful dis-

15. DOJ's amicus brief also reflects a serious misunderstanding of *Brunswick*, which imposes a standing test that is consistent with Section 7 itself. DOJ seeks a new test designed to undermine the purpose of Section 7 and to strip private plaintiffs of all protection thereunder. Essentially, the amicus brief seeks repeal of the private enforcement provisions of the antitrust laws, at least with respect to Section 7 cases. *See* DOJ Br. 8-9 n.9 (discussing the "tension" between the private enforcement provisions and the pre-merger clearance procedures under the Hart-Scott-Rodino Act). As discussed *supra* at 12-13 and n.14, whether the Clayton Act should be repealed or amended is a legislative question and is not properly directed to this Court.

cussion of this Court's important decisions in the area of antitrust standing. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), are relegated, without discussion, to a single footnote. Pet. 15 n.12. Excel does not address these important precedents because it cannot find fault with the lower courts' application of those decisions to the facts of this case. Lacking any argument that the lower court's decisions "conflict with applicable decisions of this Court," *Sup. Ct. R. 17.1(c)*, Excel has elected simply to ignore this Court's pronouncements on antitrust standing.

Of course, *Brunswick*, *Associated General* and *McCready* involved claims for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982)("Section 4"). In this action for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982)("Section 16"), Monfort's proof of "threatened loss or damage" is subject to a lower standard than proof of actual harm under Section 4. Both courts below recognized this principle and incorporated it into their standing analyses. App. 3a-6a, 36a-38a.[16]

In *Associated General*, this Court identified various factors to be considered in determining antitrust standing. The district court applied those factors to the injury Monfort alleged and established at trial: destruction as a result of the struggle between IBP and Excel for market dominance. App.

16. The court of appeals noted Professor Areeda's distinction between the standards applicable under Sections 4 and 16: "denying standing to section 4 plaintiffs 'does not leave society remediless, however, as both private equitable relief and government action are available.' " App. 4a-5a n.1, quoting Areeda, "Antitrust Violations Without Damage Recoveries," 80 *Harv. L. Rev.* 1127, 1139 (1976). Excel purports to qualify Professor Areeda's analysis by limiting the above quote to private actions by consumers but not competitors. Pet. 15 and n.13. The plain language of the article does not permit Excel's restrictive reading. *See also* II P. Areeda and D. Turner, *Antitrust Law*, ¶ 340a (1978) ("A plaintiff has undoubted standing to recover for injuries resulting from the antitrust violations of his direct competitors. Such standing is so clear that it is seldom challenged.").

34a-38a. The trial court concluded that Monfort's threatened injury is directly related to the challenged acquisition. App. 34a. The district court also found that Monfort is a member of one of only three groups who might be expected to challenge the acquisition — competitors, consumers and suppliers — and that consumers and suppliers would be unlikely to do so.[17] App. 35a. Moreover, in a reasoned and wholly proper application of *Brunswick's* "antitrust injury" requirement, the trial court held that the threat to Monfort as a result of the proposed acquisition constitutes antitrust injury, that is, it is the type of injury likely to be caused by the proposed acquisition and, equally critical, it is the type of harm that the antitrust laws were intended to prevent. App. 37a-38a.

The court of appeals independently considered the applicable antitrust standing principles. Focusing primarily on *Brunswick*, the Tenth Circuit approved the trial court's conclusion that Monfort indeed had established antitrust injury. The court of appeals rejected Excel's attempt to find refuge in *Brunswick's* holding that the "antitrust laws were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick*, 429 U.S. at 488 (emphasis in original)(quoting *Brown Shoe*, 370 U.S. at 320). It properly observed "that Monfort's harm as a competitor may be a subset of the overall harm to competition." App. 7a n.4.

3. Integral to Excel's and DOJ's argument that Monfort cannot show antitrust injury is their mistaken view

17. Excel states that consumers and suppliers generally have standing to challenge mergers alleged to violate Section 7 because "[oligopoly] pricing might threaten injury" to members of those groups. Pet. 16, 22. In fact, the basis for Excel's attack on Monfort's standing — that potential interim benefits preclude a finding of antitrust injury — would apply equally to consumers and suppliers. As the district court recognized, "the consumers of boxed beef and the sellers of fed cattle have no motivation, in the short term, to attack the planned sale because, at least initially, it would be a direct benefit to them." App. 35a. Moreover, consumers and suppliers, who transact business regularly with Excel and Spencer and have an interest in maintaining a harmonious vertical relationship with those entities, have a strong disincentive to challenge the proposed acquisition.

that Section 7 is not violated absent proof of collusion or predatory activity. *See* Pet. 19-21. The thrust of Excel's and DOJ's position is that no competitor can show the requisite injury unless, *inter alia*, the challenged acquisition gives the acquiring entity "so substantial a share of the industry's capacity as to enable it to increase supply dramatically and thereby lower general market price levels enough to force rivals to leave the market." *Id.* at 20.[18] *See also* DOJ Br. 11. In plain terms, according to Excel and DOJ, a competitor like Monfort never can show antitrust injury unless the challenged acquisition violates the Sherman Act as well as Section 7.

By focusing narrowly on predatory pricing, Excel and DOJ are attempting to convert this suit into a Section 2 predatory pricing case. It is not such a case. While predatory pricing is surely one manifestation of the breakdown of the competitive process as the result of an unlawful acquisition, it is not the only example of anticompetitive conduct in a concentrated industry, particularly one dominated by one or two leading firms. *Cf., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847, 2859 and n.32 (1985). Monfort's burden is not to show that Excel or IBP will engage in predatory pricing or some other form of exclusionary conduct after the acquisition. Instead, the correct question — properly formulated and resolved by the courts below — is whether, by reason of the acquisition, Excel and IBP threatened to engage in anticompetitive conduct of any kind to increase their market shares at the expense of Monfort and other smaller beef packers. The district court found that threat to be real as a matter of fact.

That Excel's and DOJ's view flies in the face of Sections 4 and 16 and this Court's antitrust standing decisions is too

18. In addition, Excel argues that the following conditions must exist before a competitor can establish antitrust injury: (1) the acquiring entity must have the resources necessary to survive a loss of profits during a price-cutting period; and (2) the acquiring entity must have the power to "exploit the monopoly gained from destroying most of its rivals . . ." Pet. 20.

obvious to warrant extended discussion. "[C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and the competition is thereby lessened." *Brunswick*, 429 U.S. at 489 n.14; *McCready*, 457 U.S. at 482. Indeed, equating a competitor's burden of proof as to antitrust injury with a separate Sherman Act violation contradicts Section 7's plain language and legislative history. *Brown Shoe*, 370 U.S. at 318 and n.33 ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding . . . ") (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5). *Accord Philadelphia Nat'l Bank*, 374 U.S. at 355. Properly rejected by the lower courts in this case, App. 8a-11a, 38a-39a, Excel's novel theory does not merit this Court's consideration.

4. Not surprisingly in light of the lower courts' unassailable adherence to this Court's precedents, the decisions below are consistent with other lower courts' recent decisions on the issue of competitor standing to challenge acquisitions under Section 7. In *Cia. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), the First Circuit upheld the plaintiff's standing in the face of defendants' motion for summary judgment:

> We cannot conceive of a more appropriate plaintiff to challenge defendants' merger. Caribe is a direct competitor of defendants in the refined gasoline market. The gravamen of its complaint is that defendants' merger tends to lessen competition and to yield a greater concentration of firms within that market. Caribe acknowledges that it has not sustained an actual measurable injury in the short term flowing from the merger, but it correctly claims that this is not required for a § 16 action; its allegations that the refined gasoline market has been harmed by these putative antitrust violations and that it will likely be "squeezed" out of the market in the fore-

> seeable future because of defendants' actions are sufficient.

Id. at 408 (footnote omitted). *Accord Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354, 1357 (6th Cir.), *petition for cert. dismissed*, 105 S. Ct. 1155 (1985) (upholding beer producers' standing to challenge competitors' merger, where the increased economic power of the merged corporation might induce distributors to drop the smaller brewers as customers); *Chrysler Corp.* v. *General Motors Corp.*, 589 F. Supp. 1182, 1187-93 (D.D.C. 1984) (competitor's allegation that it was threatened with injury due to decreased competition as a result of challenged joint venture satisfied the pleading requirements of Sections 7 and 16). As these decisions demonstrate, the lower federal courts have experienced no difficulty in understanding and applying the antitrust injury standard in Section 7 suits brought by competitors.

5. Excel's attack on the permissibility of competitor suits rests on its erroneous contentions that (1) the federal courts are ill-equipped to decide the merits of a Section 7 claim, and (2) the threat of litigation improperly causes parties to transactions to abandon their plans. Pet. 21, 22. DOJ echoes Excel's second argument. DOJ Br. 14-15. Monfort respectfully submits that each of these arguments is belied by this and other cases involving Section 7 claims.

The long history of federal courts' adjudication of Section 7 claims aptly refutes Excel's assertion that such adjudication is "a guess, without pretense of accuracy." Pet. 21. Using the standards that this Court has established, lower federal courts have demonstrated that they are more than capable of deciding the issues posed in Section 7 cases. Indeed, Excel's resort to this line of argument underscores the patent invalidity of its petition.

Excel's and DOJ's suggestion that a plethora of competitor suits has led to inappropriate abandonment of transactions also is without merit.[19] The forecast of a burgeoning number of competitor suits is simply inaccurate.[20] Even more importantly, the implicit suggestion that those competitor suits that have been brought lack merit is misleading. Of the decisions cited in footnote 11 to the petition and footnote 20 to the amicus brief, not one resulted in a decision on the merits upholding the acquisition, although all of the transactions were consummated after modification to comply with Section 7. In fact, the reported decisions reflect that competitor challenges under Section 7 are frequently successful on the merits.[21]

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19. Footnote 20 to the petition is particularly misleading. The "thirty-three reported decisions" referenced in the ABA Monograph were all private actions by takeover targets, not competitors of merging firms. *See* ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Enforcement of Section 7 of the Clayton Act* (1977) 33-34, *cited in* Pet. 22 n. 20.

20. As the court of appeals observed: "[t]here have been relatively few instances of suits by competitors to enjoin acquisitions as being in violation of Section 7 of the Clayton Act." App. 11a. DOJ expresses alarm that six competitor suits have been filed in the past two years. DOJ Br. 14 n. 20. When compared with the total filings in the federal courts during that period, a total of six competitor suits is plainly de minimis.

21. *E.g.*, *White Consolidated Industries, Inc.* v. *Whirlpool Corp.*, 49 *Antitrust & Trade Reg. Rep.* (BNA) at 91 (N.D. Ohio July 3, 1985)(entering preliminary injunction against acquisition), *modified*, 49 *Antitrust & Trade Reg. Rep.* (BNA) at 349 (N.D. Ohio Aug. 1, 1985)(preliminary injunction vacated in light of curative modifications to transaction); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 600 F. Supp. 1326 (E.D. Mich)(entering preliminary injunction against acquisition), *aff'd*, 753 F. 2d 1354 (6th Cir.), *petition for cert. dismissed*, 105 S. Ct. 1155 (1985); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F. 2d 964, 981-83, 985 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978)(affirming jury verdict in favor of plaintiff competitor); *Parrish's Cake Decorating Supplies, Inc.* v. *Wilton Enterprises, Inc.*, 1984-1 *Trade Cas.* (CCH) ¶ 65,917 (N.D. Ill. Feb. 16, 1984)(ordering treble damages and injunctive relief in favor of competitor plaintiff); *Sun Newspapers, Inc.* v. *Omaha World-Herald Co.*, 1983-2 *Trade Cas.* (CCH) ¶ 65,522 (D. Neb. June 14, 1983), *aff'd and modified per curiam*, 713 F. 2d 428 (8th Cir. 1983)(ordering preliminary injunction against horizontal acquisition in Section 7 action brought by competitor).

Indeed, this case illustrates the value of competitor suits. The proposed acquisition would have allowed two corporate giants, Excel and IBP, to dominate the beef packing industry and threaten smaller processors, like Monfort, with extinction. If Monfort had not challenged the acquisition, it would have gone forward and its anticompetitive effects would have escaped judicial redress.

By enacting Sections 4 and 16, Congress sanctioned private actions without limiting access to the courts to particular groups of plaintiffs. This Court consistently has encouraged enforcement of the antitrust laws by private parties, recognizing that private actions are among the most important weapons for effective enforcement. *See, e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). At the same time, the Court has articulated standing criteria that ensure that the "wrong" plaintiffs will not be permitted to prosecute Section 7 claims for the "wrong" reasons. What this Court has refused to do is "to engraft artificial limitations" on the private enforcement provisions. *McCready*, 457 U.S. at 472. Excel's and DOJ's fundamental argument — that absent proof of an imminent Sherman Act violation, no competitor will have standing to challenge an acquisition under Section 7 — seeks to impose just such an "artificial limitation" on Sections 4 and 16. Thus, Excel's petition should be denied.

CONCLUSION

For the reasons stated in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,

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JOINT APPENDIX

(8)

No. 85-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. AND EXCEL CORPORATION,
Petitioners,

v.

MONFORT OF COLORADO, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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JOINT APPENDIX
Volume I

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PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1985
CERTIORARI GRANTED JANUARY 13, 1986

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-F-1318

MONFORT OF COLORADO, INC.,
Plaintiff,

v.

CARGILL, INC. AND EXCEL CORPORATION,
Defendants.

RELEVANT DOCKET ENTRIES

DATE—NR.—PROCEEDINGS

7/25/83———COMPLAINT—pd

8/05/83———MOTION for Preliminary Injunction. . .by Plft. . .COS

8/11/83———ORDERS RE: DISCOVERY AND PRELIMINARY INJUNCTION (SGF). . .ORDERED: that Plft's. Motion to Compel production is DENIED. . .FURTHER ORDERED: that Plft's. Second Motion for expedited discovery is GRANTED. . .Deft's. shall respond to Plft's. second set of interrogatories and second request for production of documents within 7 days of service and in no event later that [sic] 8/19/83 at 12:00p.m. . .FURTHER ORDERED: that Deft's. Motion for Protective Order is GRANTED as delineated as set forth. . .A hearing on Plft's. Motion for Preliminary Injunction is set for 8/23/83 at 9:30am, Counsel are directed to file simultaneous briefs in support of or in opposition of said Motion by 8/19/83

by 12:00p.m. . .A list of an [sic] exhibits & witnesses, with a concise statement of their anticiapted [sic] testimony shall be filed by 12:00pm 8/19/83. . .The Court will direct counsel to meet prior to 8/19/83 & discuss the possibility of delaying the closing date of the subject Agreement and consolidating the Motion for preliminary injunction with a full trial on the merits at some time after discovery has been completed. . .COM. . . eod 8/11/83

*8/16/83———MINUTE ORDER (SGF). . .Deft's. Motion to Reschedule Hearing on Motion for Preliminary Injunction and for Forthwith hearing is DENIED. . .The Court reaffirms the hearing on Plft's. Motion for Preliminary Injunction 8/23/83 at 9:30am. . .The Court also reaffirms its order that list of exhibits and witnesses, with a summary of the witnesses testimony are to be filed by 12:00pm 8/19/83. . .This Order does not preclude Deft's. from seeking a hold separate order in lieu of a preliminary injunction should Plft. prevail in its request for preliminary relief. . .The Court is still of the view, however, that the most expedient course would be for the parties to stipulate to a delay in the closing of Deft's. acquisition of Spencer Beef until such time as the Court can conduct a full evidentiary hearing/trial under Rule 65(a), F.R.C.P. . .COM. . .eod 8/18/83

8/18/83———Stipulation re: the parties have conferred and agree that a protective order may issue. . .signed by counsel

PROTECTIVE ORDER (SGF). . .This Order shall govern all documents and other information produced in response to any discovery conducted by the parties to this action, or otherwise furnished or obtained by any party from any actual or potential supplier, competitior [sic] or customer of any party, including but not limited to any documents or information furnished or

obtained from IBP, Inc. . .The term "confidential material" as used in this Order shall refer to any document or other material which contains information determined by either party or any other entity furnishing such document or information to contain commercially sensitive confidential information, or any motion, memoranda or other written material which makes reference to such commercially sensitive confidential information. Unless otherwise ordered by the Court, documents designated as confidential may be inspected only by those persons set forth. . .Confidential material and copies thereof, and notes made therefrom, shall be disclosed only to independent counsel of record for named parties in this action or to persons other than employees of the parties, employed by or retained by independent Attys. of record specifically to aid in the preparation for the hearing on Plft's. Motion for preliminary injunction or for the trial of this case. . .Any person to whom such disclosure is made, other than independent counsel of record in these proceedings, shall be given a copy of this Order and shall acknowledge in writing that he has rad [sic] and understands the provisions of this Order, and has advised that its terms are applicable to him. . .All confidential material & all transcripts of depositions, pleadings, etc. made confidential shall be filed under seal. . .Upon termination of this action, the parties shall return all confidential materials, and all copies thereof, to the parties or nonparties from whom they have been obtained. . .COM. . .eod 8/18/83

8/23/83———HEARING (SGF). . .Counsel and the Court discuss having preliminary and permanent Injunction hearing at same time. . .Court informs counsel that said hearing may be held 10/4/83, Trial to Court for 2-3 days. . .Counsel will be advised of a date certain

later. . .Pretrial Conf. is set for 9/15/83 at 8:30am. . .At Pretrial Conf. counsel are to submit a list of witnesses with a short statement of what they will testify to & a resume of witness(es), a briefing schedule is also to be agreed upon. . .By 5:00pm 9/29/83 counsel are to file: proposed findings of fact and conclusions of law; any memorandum of authorities; final list of exhibits & final list of witnesses. . .Depositions are to be edited. . .Court is to be advised of the prospects of settlement by 9/15/83. . .eod 8/23/83

8/24/83———MOTION to Reschedule Hearing on Plft's. Motion for Preliminary Injunction and to Consolidate that hearing with trial on the merits. . .by Deft's. . .COS

8/25/83———Plft's. Response to Deft's. Motion to Reschedule and Consolidate. . .COS

ORDER (SGF). . .ORDERED: that the hearing on Plft's. Motion for Preliminary Injunction is consolidated with trial on the merits of this action & the consolidated hearing and trial shall be heard during the week of 10/3/83 at a date & time to be specified by the Court. . .COM. . .eod 8/26/83

9/15/83———PRETRIAL CONF. (SGF). . .Case set on Trial Calendar 10/5/83 at 9:00am for 3 days. . .Prospects of Settlement due 9/28/83. . .by 9/30/83, counsel are to comply with as prescribed in the Pretrial Order. . .Pretrial Order due 9/15/83. . .ORDERED: Motion to Compel is DENIED. . .Motion for Production of Cargill annual reports for 81 & 82 is GRANTED. . .eod 9/15/83

10/05/83———TRIAL TO COURT (SGF) FIRST DAY. . .Opening statemnts [sic]. . . witnesses . . . exhbts. recess to 10/6/83 at 9 a.m. eod 10/14/83

10/06/83———MOTION for Involuntary Dismissal. . .by Deft's. . . COS

10/06/83———TRIAL TO COURT (SGF) Second Day. . . ORDERED Deft's oral motion for involuntary dismissal is denied. . . ORDERED: pltf's exhbts 1 thru 76 are admitted. . .witnesses. . .exhbts. . .eod 10/14/83.

10/07/83———pltf's supplemental trial brief. . .

TRIAL TO COURT (3rd Day). . .Record on exhbts. . . Deft's oral motion to dismiss is renewed and ruling is reserved. . .closing arguments. . .Matter submitted. . .Any supplemental proposed findings of fact and conclusions of law are to be filed by 10/13/83. . .eod 10/14/38 [sic] (EXHBT LIST ATTACHED).

12/01/83———MEMORANDUM OPINION AND ORDER (SGF). . . That defts Excel Corporation and Cargill Inc., are PERMANENTLY ENJOINED from consummating the Proposed acquisition between Excel Corporation, Cargill, Inc. and Spencer Beef Division of Land O'Lakes, Inc.

12/01/83———MEMORANDUM OPINION AND ORDER (SGF) CONTINUED:

The defendants, are further ENJOINED from undertaking any plan or entering into any agreement, the effect of which would be to allow the acquisition, merger, consolidation, operation or in any other way permit the combination of the ownership or operation of the beef packing businesses of defts and the Spencer Beef Division of Land O'Lakes, Inc. Judgment will enter for Plaintiff Monfort of Colorado on its claim for injunctive relief. FURTHER ORDERED that Plaintiff Monfort of Colorado, as the prevailing Party is entitled to an award of costs and reasonable attorneys' fees pursuant to 15 USC 26. The Court will enter additional orders at a later date regarding the award of attorneys' fees. Clerk of the cour [sic] is hereby directed to enter judgment in favor of plaintiff Monfort of Colorado, and against the defendants, Cargill

Inc., and Excel Corporation on the plaintiff complaint for injunctive relief. COM eod 12/2/83.

JUDGMENT (SPE). . . That judgment be entered in favor of the plaintiff Monfort of Colorado and against defts on plaintiff's complaint for injunctive relief. FURTHER ORDERED that the Plaintiff shall have its costs upon the filing of a bill of costs with the clerk of the court w/in 10 days after enter [sic] of this judgment. . .c.om. eod 12/2/83.

12/07/83———MOTION to clarify or in the alternative Motion to alter or amend Rule 59(e). . .c.o.m.

MOTION TO INTERVENE by Land O'LAKES, INC., c.om.

12/12/83———NOTICE OF APPEAL by deft Cargill, Inc. and Excel Corp from the Judgment 12/2/83.

Designation Conference has been set for December 19, 1983 at 8:30 before Steve Ehrlich.

12/12/83———MOTION by Defts Cargill and Excel for clarification of order. . .c.o.s.

12/12/83———ORDERED (SGF) *Denying* Application for Intervention, filed by LAND O'LAKES, INC. C.O.M. eod 12/14/83.

12/13/83———Case No. 83-2588 assigned by the Court of Appeals.

12/19/83———ORDER (SGF) that all Motions for Clarification of Order or in the Alternative, for Modification of Injunction Pending Appeal and Motion for Expedited Determination, are individually and collectively *denied*. C.O.M. eod 12/21/83.

1/9/84———MOTION of Plaintiffs for an Order Requiring Defendants to Show Cause. C.O.S.

1/17/84———ORDER (SGF) *granting* Plaintiff's Motion for an Order Requiring Defendants to Show Cause in

writing by 1/25/84 why their transaction involving the Oakland Iowa Beef Plant does not constitute a violation of this Court's Order of 12/1/83. Plaintiff is *directed* to file a Reply to Defendant's Response by 2/2/84. The Court will thereafter take such further action or direct such further proceedings as it deems appropriate. C.O.M. eod 1/19/84.

1/25/84———Response of Defendants to Order to Show Cause. FILED UNDER SEAL. (Note: Placed in Vault.).

2/27/84———ORDER (SGF) that the Court finds that Defendants' acquisition of the Oakland, Iowa Plant of the SPENCER BEEF DIVISION of LAND O'LAKES, INC., violates this Court's Order of 12/1/83. Defendants are *directed* to return ownership and control of the Oakland Plant to the SPENCER BEEF DIVISION of LAND LAKES, INC. Defendants are *directed* to file with the Court by 3/9/84 a plan regarding the transfer of interests and assets in accordance with this Order. Plaintiff may respond to Defendants' plan by 3/16/84. Defendants are *directed* to neither own nor operate nor control in any way the Oakland, Iowa Plant of the SPENCER BEEF DIVISION of LAND O'LAKES, INC. C.O.M. eod 2/28/84.

3/02/84———NOTICE OF APPEAL, filed by Defendants, re Order of 2/27/84. C.O.S. ($5.00 and $65.00 paid).

3/07/84———Case No. 84-1305 assigned by the Court of Appeals.

Record on Appeal, consisting of Supplemental Volumes II through VII, transmitted to the Court of Appeals.

3/09/84———MOTION of Defendants for Stay of Order and for Expedition of Determination. (NOTE: Filed under seal, placed in Vault).

4/10/84———ORDER (SGF) that Defendants' Motion for Stay of Order is *denied*. C.O.M. eod 4/11/84.

4/27/84———ORDER from the Court of Appeals that they are *remanding* C.A. No. 84-1305 partially to the District Court to permit that Court to hold proceedings on the enforcement of the 2/27/84 retransfer Order. Such partial remand shall not abate these appeals and the briefing of them. eod 4/27/84.

5/02/84———ORDER (SGF) that Defendants CARGILL, INC., and EXCEL CORPORATION, shall return ownership and control of the OAKLAND, IOWA PLANT to LAND O'LAKES, INC., in compliance with this Court's Order of 2/27/84, no later than 5/4/84. C.O.M. eod 5/3/84.

5/15/85———MANDATE from the Court of Appeals (4/23/85) (83-2588 and 84-1305) JUDGMENT... That the judgment of District Court is AFFIRMED.

5/29/85———MOTION of Cargill, Inc., and Excel Corp. to Modify Injunction by Reason of Changed Circumstances, Memorandum in Support of Motion to Modify Injunction by Reason of Changed Circumstances and MOTION for Scheudling [sic] Conference UNDER SEAL (in white envelope in vault)

6/26/85———ORDER (SGF)...The Motion to Modify the Injunction filed 5/29/85 is DENIED...This order constitutes the Court's Findings of fact and conclusions of law...COM...eod 6/26/85

10/02/85———Notification from the Court of Appeals that Petition for Writ of Certiorari was filed in the Supreme Court (re: 83-2588 and 84-1305) on September 19, 1985 and was assigned case no. 85-473.

1/22/86———Notification from the Court of Appeals that Petition for Writ of Certiorari was granted by the Supreme Court on 1/13/86. Record to remain intact until after the Supreme Court disposes of this case.

2/6/86———Record on Appeal, consisting of Volumes I through IX and Supplemental Volumes I through IX, transmitted to the U.S. Supreme Court.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-2588

MONFORT OF COLORADO, INC.,
Plaintiff-Appellee,

v.

CARGILL, INC. AND EXCEL CORPORATION,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE—FILINGS—PROCEEDINGS

12/13/83———CS.DKT Case docketed

4/27/84———O.RMK. Ordered: We therefore deny defendant's request for a stay of the 2/27/84 retransfer order and dissolve the temporary stay we entered on 4/16/84 to hear this motion. On consideration of the motions to consolidate the instant appeal with 83-2588 and 84-1060 we have carefully reviewed the motions and the responses thereto, and hereby order the appeals to be consolidated and expedited for purposes of argument and disposition. The Clerk will give subsequent directions concerning the briefing and briefing schedule so that the cases will be ready for argument and submission by July 15, 1984. We are forthwith remanding 84-1305 partially to the district court to permit the Court to hold proceedings on the enforcement of the 2/27/84 retransfer order. Such partial remand shall not abate these appeals and the briefing of time -Holloway Barrett, Doyle (parties notified)

5/18/84———BR.F. Appellant's brief filed, orig & 9cc,c/s

6/08/84———BR.F. Appellee's brief filed, orig & 9cc,c/s

6/29/84———BR.F. Appellants' reply brief filed, orig & 9cc,c/s

9/11/84———CS.ARG.SUBM - Logan, Breitenstein, McWilliams

4/23/85———OPN.F. Published, signed opinion filed. Logan, Breitenstein & McWilliams. Writing Judge Logan JM.DISP. Judgment affirmed.

5/15/85———MDT.ISS. Mandate issued to district court.

10/01/85———P.WRIT.CERT.F. Appellants' petition for writ of cert filed on 9/19/85. S.C. No. 85-473

1/17/86———P.WRIT.CERT.DISP Appellant's petition for writ of certiorari granted by Supreme Court on 1/13/86. (notified district court)

2/05/86———CERT.REC.TRMT.SC Certiorari record transmitted to Supreme Court of the United States, Page 1. Pleas and proceedings before the United States Court of Appeals for the Tenth Circuit. 2. Original record on appeal from the United States District Court for the District of Colorado (to be sent by the District Court to the Supreme Court). 3. Submission order. 4. Opinion of the United States Court of Appeals for the Tenth Circuit. 5. Judgment of the United States Court of Appeals for the Tenth Circuit. 6. Mandate of the United States Court of Appeals for the Tenth Circuit. 7. Clerk's certificate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-F-1318

MONFORT OF COLORADO, INC.
Plaintiff,

vs.

CARGILL, INC. AND EXCEL CORPORATION,
Defendants.

COMPLAINT

Jurisdiction and Venue

1. This is an action for injunctive relief barring defendants from acquiring the Spencer Beef Division of Land O'Lakes, Inc. It is based upon Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26). Plaintiff seeks to prevent and restrain the violation by defendants of Section 7 of the Clayton Act (15 U.S.C § 18) and Section 1 of the Sherman Act (15 U.S.C. § 1).

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337.

3. Each of the defendants maintains an office, transacts business, has an agent or is found within this district, and each defendant is within the jurisdiction of this Court for the purpose of service of process. Accordingly, venue lies in this district pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(b) and (c).

4. Each of the defendants is engaged directly in the sale, purchase or distribution of goods or services in interstate commerce. The production and sale of fresh beef as described below constitute trade and commerce in and among the several states and the District of Columbia.

Parties

5. Plaintiff Monfort of Colorado, Inc. is a Delaware corporation with its principal place of business in Greeley, Colorado. Monfort is engaged in the production, transportation and sale of cattle, beef and lamb products. Monfort has plants for cattle slaughter and beef fabrication in Greeley, Colorado, and Grand Island, Nebraska.

6. Defendant Cargill, Inc. is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. It is the largest privately owned company in the United States and the largest grain company in the world. Cargill operates more than 150 subsidiaries in at least 35 countries. If Cargill were a public corporation, it would be among the top 15 firms in the Fortune 500. Cargill is the nation's largest commercial custom cattle feeder through its ownership of Caprock Industries. Another subsidiary, Nutrena Feeds, is one of the largest commercial livestock feed manufacturers in the United States. Cargill's 1979 sales have been estimated to be $12.6 billion and earnings to be $150 million.

7. Defendant Excel Corporation is a wholly-owned subsidiary of Cargill, Inc. It is a Delaware corporation and has its principal place of business in Wichita, Kansas. Excel Corporation was formerly known as MBPXL. MBPXL was formed in 1974 as a result of the merger of Missouri Beef Packers and Kansas Beef Industries. In 1979 MBPXL was acquired by Cargill and in 1982 its name was changed to Excel Corporation. Excel has 6 plants:

Location	Daily Slaughter Capacity
Rockport, Missouri	1,800
Friona, Texas	3,300

Plainview, Texas	3,500	
Dodge City, Kansas	3,600	
Wichita, Kansas	-	(fabrication only)
Cozad, Nebraska	-3,500	(under construction)
TOTAL	15,700	

The Proposed Acquisition

8. On June 17, 1983, it was announced that Excel Corporation, the second largest beef packing company in the country, had signed an agreement to acquire the third largest beef packer, the Spencer Beef Division of Land O'Lakes, Inc. ("Spencer Beef")

9. Land O'Lakes, Inc. is an agricultural cooperative with its principal place of business in Arden Hills, Minnesota. Spencer Beef is the third largest beef packing company in the country. It has three plants:

Location	Daily Slaughter Capacity
Spencer, Iowa	2,000
Oakland, Iowa	2,600
Schuyler, Nebraska	2,700
TOTAL	7,300

Trade and Commerce

10. The production and sale of beef and beef products is a multi-billion dollar industry. The average person consumes about 75 pounds of beef each year and spends about one-fourth of his or her food budget on red meat.

11. The beef industry is highly concentrated—and rapidly becoming more so. In the ten years ending in 1979, over 35% of the nation's cattle slaughter and beef packing

plants were closed. If consummated, the proposed acquisition would increase concentration in the beef industry to an impermissible extent.

12. The beef industry is dominated by IBP, Inc. and Excel Corporation. IBP and Excel have doubled their combined market share in the last five years through a continuous program of expansion and acquisition. Indeed, as recently as April, 1983, Excel acquired a beef packing plant in Cozad, Nebraska and announced plans to expand it from a slaughter capacity of 800 head per day to approximately 3,500.

13. The steps in the production of fresh beef include cattle feeding, slaughter, fabrication and sales. There are two primary categories of cattle slaughter: (a) fed steers and heifers which grade USDA "good", "choice" or "prime" and produce quality cuts of fresh beef, and (b) cows and bulls which produce hamburger or other processed meat products.

14. Most cattle slaughter involves steers and heifers which have been fattened in a commercial feedlot. For example, in 1982 almost 70% of the cattle slaughtered commercially were fed steers and heifers; another 8% were non-fed steers and heifers (e.g., steers and heifers which were not of sufficiently high quality to warrant commercial feeding). The balance of the cattle slaughtered—about 22%—were cows and bulls. For purposes of convenience, the use of the phrase "fed cattle" in this complaint shall refer to steers and heifers that have been fed grain in cattle feedlots.

15. Of the quality fresh beef resulting from the slaughter of fed steers and heifers, approximately 70% is fabricated by the beef packer and sold as "boxed beef." The balance is sold as carcasses.

16. As described below in more detail, this case involves the effect of the proposed acquisition on two principal

markets: the market for the procurement of fed cattle and the market for the sale of boxed beef.

Procurement of Fed Cattle

17. Commercial feedlots are highly specialized enterprises which fatten steers and heifers which can be expected to produce a carcass that will grade USDA "good" or better. Feedlots may be independent, or integrated with the beef processing operations of a beef packer.

18. Commercial feedlots generally are located in areas with an abundant supply of feed grains and feeder cattle. Since the cost of transporting fabricated beef is less than the cost of transporting live cattle, beef processing plants specializing in the slaughter of fed steers and heifers also tend to be located in the proximity of the commercial feedlots. Accordingly, most of the slaughter requirements for beef processing plants are either purchased directly from independent feedlots located relatively near the plants, or in the case of integrated enterprises, supplied by packers' own feedlots.

19. A 1982 report issued by the United States Department of Agriculture indicated that cattle procurement was centered in several mid-western and high plains states including portions of Nebraska, South Dakota, Iowa, Kansas, Texas and Colorado. These regional markets for the procurement of cattle are highly concentrated.

20. If the proposed acquisition is consummated, concentration will be even greater in the markets in which Monfort competes with defendants for the acquisition of fed cattle. For example, Excel/Spencer Beef would have beef packing plants in five states: Iowa, Kansas, Missouri, Nebraska and Texas. In 1982, approximately 14,500,000 fed cattle were marketed in these states.

21. Beef processing plants operated by Excel/Spencer Beef would have the capacity to process nearly 6,000,000

fed cattle annually—approximately 41% of the total fed cattle sold in the five state region.

22. IBP beef packing plants in these same states have the capacity to process an additional 5,000,000 fed cattle annually. Together, Excel/Spencer and IBP would control 75-80% of the market for the procurement of fed cattle in the states of Iowa, Kansas, Missouri, Nebraska and Texas.

23. Monfort's plant in Grand Island, Nebraska is surrounded by and competes directly with numerous facilities operated by Excel, Spencer Beef and IBP. Nonetheless Monfort only buys a small fraction of the number of fed cattle purchased by these three competitors. If Excel and Spencer Beef are allowed to merge, the resulting company, along with IBP, would dominate the market for the procurement of fed cattle and severely impair Monfort's ability to obtain fed cattle and compete in the boxed beef market.

Production of Boxed Beef

24. Nationally, approximately 70% of the fed steer and heifer slaughter is fabricated and distributed as boxed beef. Boxed beef is a process by which steer and heifer carcasses are fabricated into primal or sub-primal cuts which are then vacuum packaged and shipped in boxes or cartons for wholesale distribution.

25. The boxed beef share of steer and heifer slaughter can be expected to increase still further because fabrication can be done more efficiently at the packing plant; moreover transportation costs are reduced because excess fat and bone are eliminated before shipment.

26. The geographic market for the sale of boxed beef is nationwide. Beef packing plants, including those operated by Monfort, Excel, Spencer Beef and IBP, ship boxed beef throughout the country.

27. The proposed acquisition would result in the merger of the second and third largest beef packing firms in the country. While precise market share data are not presently known to Monfort, the best available information indicates that the following market shares, based upon annual plant capacity to slaughter and fabricate boxed beef, are as follows:

	Box Beef Capacity	Estimated Market Share (%)
IBP	7,254,000	36
Excel	4,056,000	26
Spencer Beef	1,898,000	8
Monfort	1,508,000	6

(Market share data for other firms in the market are not presently available.)

28. Based upon these estimated market shares, the proposed acquisition clearly violates the merger guidelines issued by the United States Department of Justice merger guidelines.

29. The Department of Justice merger guidelines rely on the Herfindahl-Hirschman Index ("HHI") to measure market concentration and evaluate mergers between competitors. The HHI for a particular market is calculated "by summing the squares of the individual market shares of all the firms" in the market. The following chart reflects the HHI for the boxed beef market *after* the proposed acquisition:

IBP	1,296
Excel/Spencer Beef	1,156
Monfort	36
	2,488

30. According to the Department of Justice, markets with a post-merger HHI in excess of 1800 are "highly concentrated." Acquisitions within these markets raise "significant competitive concern."

31. In this case, even without considering the shares of all the firms in the market, the merger is plainly anticompetitive.

Barriers to Entry in the Beef Industry

32. Barriers to entry in the beef industry are high for two primary reasons. First, capital requirements for new entry would be substantial. The cost of construction and working capital would require a potential entrant to invest $60-100 million. A capital investment of this magnitude, particularly in light of the beef industry's historically low rate of return, creates a significant barrier to entry.

33. Second, in order to minimize unit costs, modern beef processing plants must operate at or near capacity. A potential entrant must therefore have a consistent source of fed cattle sufficient in number to allow operations to run at capacity. If the proposed acquisition is consummated, Excel/Spencer Beef and IBP will dominate the procurement of fed cattle and greatly reduce the source of supply for any potential new entrant.

Violations Alleged

34. The acquisition of Spencer Beef by defendants violates Section 7 of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in several different ways:

(a) *Elimination of direct competition in the market for fed cattle.* Actual and potential competition between Spencer Beef and defendants in the procurement of fed cattle will be eliminated. Concentration in local, state or regional markets—already high—will be increased.

(b) *Curtailment of competition in the market for fed cattle.* In addition to the elimination of competition between defendants and Spencer Beef, the proposed acquisition will make defendants a dominant purchaser of fed cattle. Defendants will have the incentive and ability to use their increased power in the market for the procurement of fed cattle to foreclose or impair competition in the market.

(c) *Elimination of competition in the market for boxed beef.* Actual and potential competition between defendants and Spencer Beef in the marketing of boxed beef will be eliminated. Concentration in the market for the sale of boxed beef would be significantly increased.

(d) *Curtailment of competition in the market for boxed beef.* The proposed acquisition will increase concentration in the market for the sale of boxed beef. Defendants will have the incentive and ability to use their increased market power to foreclose or impair competition in the market for boxed beef.

(e) *Elimination of competition in the beef industry generally.* The merger of the second and third largest beef packing firms may precipitate other mergers and acquisitions between and among firms in the industry, which will further eliminate actual and potential competition in the markets described above. In addition, the proposed acquisition and those that follow will raise barriers to entry and generally increase concentration in an industry which is already highly concentrated.

(f) *Impairment of plaintiff's ability to compete.* The proposed acquisition will result in a concentration of economic power in the relevant markets which threatens Monfort's supply of fed cattle and its ability to compete in the boxed beef market.

35. The proposed acquisition constitutes a contract, combination or conspiracy in restraint of trade and violates

Section 1 of the Sherman Act (15 U.S.C. § 1). By reason of such violation, Monfort is threatened with loss or damage as more fully set forth in the preceding paragraphs of this complaint.

Public Interest; Irreparable Harm

36. The acquisition of Spencer Beef by defendants, if not temporarily, preliminarily and permanently enjoined, will injure the public interest and result in irreparable harm as follows:

(a) Competition in the markets for the procurement of fed cattle and the sale of boxed beef will be substantially lessened and a monopoly may tend to be created in violation of Section 7 of the Clayton Act;

(b) Concentration in those lines of commerce will be increased and the tendency towards concentration will be accelerated.

(c) Barriers to entry in those lines of commerce will be increased.

(d) Competition in the markets for the procurement of fed cattle and the sale of boxed beef will be unreasonably restrained in violation of Section 1 of the Sherman Act.

(e) Once the assets and operations of defendants and Spencer Beef become commingled, it will be impossible to restore Spencer Beef fully to its present independent status if the proposed acquisition is eventually held to be illegal;

(f) The elimination of Spencer Beef as a direct competitor will cause injury to Monfort and the general public which cannot be accurately measured and for which damages cannot provide adequate compensation; and

(g) There is no adequate remedy at law.

Prayer

WHEREFORE, plaintiff prays:

1. That the proposed acquisition by defendants of the Spencer Beef Division of Land O'Lakes, Inc. be adjudged to be in violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act;

2. That defendants be preliminarily and permanently enjoined from consummating the proposed acquisition or any similar plan or agreement the effect of which would be to allow the acquisition, merger, consolidation, operation, or in any other way permit combination of the ownership or operation of the beef packing businesses of defendants and Spencer Beef;

3. That plaintiff be granted such other and further relief as this Court may deem just and proper; and

4. That plaintiff recover from defendants the cost of this suit and reasonable attorneys fees.

Dated July 25, 1983.

HOLLAND & HART

William C. McClearn
James E. Hartley
Marcy G. Glenn

/s/ James E. Hartley

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ATTORNEYS FOR PLAINTIFF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

ANSWER

Defendants, Cargill, Inc. and Excel Corporation ("Defendants"), by their attorneys, Morrison & Foerster, answer the Complaint as follows:

JURISDICTION AND VENUE

1. Defendants admit that Plaintiff purports to base this action upon the statutes stated in Paragraph 1, but deny all other allegations of Paragraph 1. Defendants aver that Plaintiff has no right to prevent, bar, or restrain Defendants from acquiring the Spencer Beef Division of Land O' Lakes ("Spencer Beef") and that the proposed acquisition will in no way violate Section 7 of the Clayton Act, Section 1 of the Sherman Act, or any other provision of law.

2. Defendants admit the allegations of Paragraph 2.

3. Defendants admit the allegations of Paragraph 3.

4. Defendants admit the allegations in the first sentence of Paragraph 4. Defendants further admit that the production and sale of beef and beef products constitute trade and commerce in and among the several states. Defendants deny the remaining allegations of Paragraph 4.

PARTIES

5. On information and belief, Defendants admit the allegations of Paragraph 5.

6. Defendants admit that Cargill, Inc., is a Delaware corporation with its principal place of business in Minneapolis, Minnesota, and that Cargill, Inc., operates more than 150 subsidiaries in at least 35 countries, including Caprock Industries and Nutrena Feeds. Defendants are without sufficient knowledge or information to form a belief as to the remaining allegations in Paragraph 6 and therefore deny those allegations.

7. Defendants admit the allegations in the first 5 sentences of Paragraph 7. Defendants also admit that Excel operates 6 plants in Rockport, Missouri; Friona, Texas; Plainview, Texas; Dodge City, Kansas; Wichita, Kansas; and Cozad, Nebraska, that its Dodge City, Kansas, plant has a daily slaughter capacity of 3,600, and that its Wichita, Kansas, plant is fabrication only. Defendants deny all other allegations in Paragraph 7.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

8. Defendants deny that Spencer Beef is the third largest beef packer in the country, but admit all other allegations of Paragraph 8.

9. Defendants admit that Spencer Beef has plants in Spencer and Oakland, Iowa, and Schuyler, Nebraska, and that Land O' Lakes, Inc., is an agricultural cooperative with its principal place of business in Arden Hills, Minnesota, but deny all other allegations of Paragraph 9.

10. Defendants admit that the production and sale of beef and beef products is a multi-billion dollar industry, but lack sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 10 and therefore deny those allegations.

11. Defendants deny the allegations of Paragraph 11.

12. Defendants admit that in April of 1983, Excel acquired a beef packing plant in Cozad, Nebraska, but deny all other allegations of Paragraph 12.

13. Defendants admit that the steps in the production of fresh beef include, but are not limited to, cattle feeding, slaughter, fabrication, and sales and that (a) fed steers and heifers; and (b) cows and bulls are categories of cattle. Defendants aver that other categories of cattle slaughter exist and that other products are produced from the slaughter of cows and bulls. Defendants therefore deny the remaining allegations of Paragraph 13. slaughter.

14. Defendants admit that most cattle slaughter involves steers and heifers that have been fattened in a commercial feedlot, but lack sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 14 and therefore deny those allegations.

15. Defendants lack sufficient knowledge or information to form a belief as to the allegations of Paragraph 15 and therefore deny those allegations.

16. Defendants aver that Paragraph 16 constitutes a legal conclusion to which answer is neither necessary nor appropriate. Insofar as the Paragraph is deemed to include factual averments, Defendants deny the allegations of Paragraph 16.

17. Defendants admit the allegations of Paragraph 17.

18. Defendants admit the first two sentences of Paragraph 18, but lack sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 18 and therefore deny those allegations.

19. Defendants lack sufficient knowledge or information to form a belief as to the allegation that a 1982 report issued by the United States Department of Agriculture indicated that cattle procurement was centered in several mid-western and high plains states including portions of Nebraska, South Dakota, Iowa, Kansas, Texas, and Colorado, and therefore deny that allegation. Defendants deny all other allegations of Paragraph 19.

20. Defendants admit that, if the proposed acquisition is consummated, Excel/Spencer Beef would have beef packing plants in Iowa, Kansas, Missouri, Nebraska, and Texas. Defendants lack sufficient knowledge or information to form a belief as to the third sentence of Paragraph 20 and therefore deny the allegations contained in that sentence. Defendants deny the remaining allegations of Paragraph 20.

21. Defendants deny the allegations of Paragraph 21.

22. Defendants lack sufficient knowledge or information to form a belief as to the allegations of Paragraph 22 and therefore deny those allegations.

23. Defendants deny the allegations of Paragraph 23.

24. Defendants lack sufficient knowledge or information to form a belief as to the first sentence of Paragraph 24 and therefore deny the allegations contained in that sentence. Defendants deny the remaining allegations of Paragraph 24.

25. Defendants lack sufficient knowledge or information to form a belief as to the allegations of Paragraph 25 and therefore deny those allegations.

26. Defendants admit that beef packing plants, including ones operated by Monfort, Excel, Spencer Beef, and IBP, ship boxed beef throughout the country. Defendants lack sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 26 and therefore deny those allegations.

27. Defendants admit that Excel is the second largest beef packing firm in the country, but deny all other allegations of Paragraph 27.

28. Defendants deny the allegations of Paragraph 28.

29. Defendants admit that the Department of Justice merger guidelines rely, in part, on the Herfindahl-Hirsch-

man Index to measure market concentration and to evaluate mergers among competitors and that the Herfindahl-Hirschman Index is calculated "by summing the squares of the individual market shares of all the firms" in the market. Defendants deny all other allegations of Paragraph 29.

30. Defendants deny the allegations of Paragraph 30. The Department of Justice merger guidelines speak for themselves.

31. Defendants deny the allegations of Paragraph 31.

32. Defendants deny the allegations of Paragraph 32.

33. Defendants deny the allegations of Paragraph 33.

34. Defendants deny the allegations of Paragraph 34.

35. Defendants deny the allegations of Paragraph 35.

36. Defendants deny the allegations of Paragraph 36.

37. Responding to each of Plaintiff's prayers for relief, Defendants (1) deny that the proposed acquisition by Defendants of Spencer Beef is in any way violative of § 7 of the Clayton Act or § 1 of the Sherman Act; (2) deny that Plaintiff is entitled to injunctive relief of any kind enjoining Defendants from consummating the proposed acquisition or any similar plan or agreement the effect of which would be to allow the acquisition, merger, consolidation, operation, or in any way permit combination of the ownership or operation of the beef packing businesses of Defendants and Spencer Beef; (3) deny that Plaintiff is entitled to any relief whatsoever against Defendants; and (4) deny that Plaintiff is entitled to any costs or attorneys fees.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.

2. Plaintiff has unclean hands.

3. Plaintiff lacks standing to maintain this action against Defendants.

WHEREFORE, Defendants pray that the Complaint be dismissed with prejudice and that costs, attorneys' fees, and any other relief the Court deems just and appropriate be awarded to Defendants.

DATED August 15, 1983.

MORRISON & FOERSTER

/s/ Robert F. Hanley

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

PLAINTIFF'S ANSWERS AND OBJECTIONS TO DEFENDANTS' FIRST SET OF INTERROGATORIES

* * * *

Interrogatory No. 9. As to each relevant market (including product and geographic market) in which you contend the effects of the proposed acquisition should be analyzed for purposes of this case:

a. State each way in which you believe you will or may be injured as a result of the acquisition;

* * * *

Answer to Interrogatory No. 9.

a. The proposed acquisition will increase concentration in both relevant markets to levels that are presumptively anticompetitive. Not only will the markets be highly concentrated, but they will be dominated by two firms: IBP and Excel/Spencer Beef.

   Similarly, two-firm dominance in the packer boxed beef market will permit IBP and Excel/Spencer Beef to increase boxed beef prices to supra-competitive levels. Market dominance could also be

employed to increase the procurement price of grain fed steers and heifers, while depressing packer boxed beef prices. The resulting price-cost squeeze could severely injure the smaller competitors of IBP and Excel, including Monfort.

* * * *

Interrogatory No. 13. Do you contend that the proposed acquisition would mean (in the language of Paragraph 33 of your Complaint) that "Excel/Spencer Beef and IBP will . . . greatly reduce the source of supply [of fed cattle] for any new entrant" into a market for procurement of fed beef, as contrasted with the situation that would exist absent the proposed acquisition? If so, state the basis for your contention, and state in particular the ways in which the proposed acquisition would have such an effect as contrasted with the situation that would exist absent the acquisition.

Answer to Interrogatory No. 13. If the proposed acquisition is consummated, Excel and IBP would dominate the procurement of grain fed steers and heifers to a greater extent than if the acquisition did not occur. While IBP's procurement requirements would not change as a result of the acquisition, Excel's total grain fed steer and heifer requirements would increase significantly. Both companies would have sufficiently large market shares that they would be able to exercise market power in the procurement market. Excel in particular would have a unfair competitive advantage in the procurement of grain fed steers and heifers.

Interrogatory No. 14. State:

a. The basis for the contention in Paragraph 34(f) of your Complaint that the proposed acquisition "threatens Monfort's supply of fed cattle and its ability to compete in the boxed beef market"; and

b. The ways in which, as alleged in Paragraph 34(b) of the Complaint, the defendants would be able after the proposed acquisition to "foreclose or impair competition in the market" for procurement of fed cattle.

Answer to Interrogatory No. 14.

a. If the proposed acquisition is finalized, Excel and IBP would be the dominant purchasers of grain fed steers and heifers in the relevant market. Accordingly, they would have the incentive and ability to purchase grain fed steers and heifers in numbers that would threaten the viability of the smaller packers like Monfort. Similarly, these two firms would have market power in the packer boxed beef market and, acting interdependently, IBP and Excel would have the incentive and ability to bid up the price of grain fed steers and heifers while depressing the price of packer boxed beef. The resulting cost-price squeeze would threaten Monfort's ability to compete in the relevant product markets.

b. See answer to Interrogatory No. 14(a).

* * * *

Interrogatory No. 25. Do you contend that if a dominant beef slaughtering firm were to exert market power in procuring cattle in a given geographical market so as to depress the price paid there for such cattle, other beef slaughtering firms in that market would tend to be injured? If so, state the basis for your contention and, in particular, explain how such other firms would tend to be injured.

Answer to Interrogatory No. 25. Assuming that other firms could also acquire grain fed steers and heifers at the "depressed" price, they would not tend to be directly injured—although surely the cattle feeders would tend to be injured. As indicated in the answer to Interrogatory No. 14, however, it is equally (or more) likely that the dominant firm or firms would try to gain market share by employing a price-cost squeeze.

Interrogatory No. 26. Do you contend that if concentration in a geographical market for the procurement of cattle or fed cattle increased so as to facilitate interdependent decision-making by the participants in that market, such participants would tend to be injured? If so, state the basis for your contention and, in particular, state how such participants would tend to be injured.

Answer to Interrogatory No. 26. Yes. By virtue of their size and market power, IBP and Excel would be able to anticipate each other's actions. Therefore, without communicating directly, IBP and Excel could "agree" to bid up the price of grain fed steers and heifers and/or lower the price of boxed beef. The resulting price-cost squeeze would injure the other participants in the market.

Interrogatory No. 27. Do you contend that if a dominant beef fabrication firm exerted market power in a given market so as to raise the price at which boxed beef or other beef products were sold, other beef fabrication firms in that market would tend to be injured? If so, state the basis for your contention and, in particular, state how such other firms would tend to be injured.

Answer to Interrogatory No. 27. Assuming that competing beef packers could find refuge under the dominant firm's price "umbrella", they would not tend to be injured—although surely their customers would be. As indicated in the answer to Interrogatory No. 14, however, it is equally (or more) likely that the dominant firm or firms would attempt to gain market share by employing a price-cost squeeze.

Interrogatory No. 28. Do you contend that, if concentration in a market for the sale of boxed beef or other beef products were to increase so as to facilitate inter-

dependent pricing by the participants in that market, such participants would tend to be injured? If so, state the basis for your contention and, in particular, state how such participants would tend to be injured.

Answer to Interrogatory No. 28. Yes. In the post-merger market IBP and Excel would have the incentive and ability to manipulate prices and procurement costs to squeeze out competition and gain market share.

* * * *

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

PLAINTIFF'S ANSWERS AND OBJECTIONS TO DEFENDANTS' SECOND SET OF INTERROGATORIES

* * * *

Interrogatory No. 11. With reference to your answer to Interrogatory No. 13 of defendants' first set of interrogatories, explain why Excel "in particular" (as opposed to IBP) would have an unfair competitive advantage in the procurement of grain fed steers and heifers.

Answer to Interrogatory No. 11. If defendants are allowed to acquire the Spencer plants, Excel would have an unfair competitive advantage in the procurement of grain fed steers and heifers because it would have obtained its market share and market power as a result of an anti-competitive acquisition.

* * * *

Interrogatory No. 20. With reference to your answer to Interrogatory No. 9 of defendants' first set of interrogatories, do you know of any instances in which a "price-cost squeeze" of the sort referred to in the last sentence of your response to Interrogatory 9(a) has taken place in any part of the beef industry in the last 20 years? If so, state the basis for your contention, identify each such instance, and identify all documents relating to each such instance.

Answer to Interrogatory No. 20. The "price-cost squeeze" referred to in the answer to interrogatory 9 (first

set) has existed throughout the industry for the last 20 years. Monfort believes that pricing practices of this sort have contributed significantly to the failure of a number of beef packers in recent years.

Interrogatory No. 21. Do you contend that any relevant market you have identified for purposes of this case is currently functioning in a non-competitive fashion? If so, state the basis for your contention and identify each such market together with every respect in which it is operating noncompetitively, and provide all documents relating to your contention.

Answer to Interrogatory No. 21.

No.

* * * *

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Pl. Ex. 74

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

TESTIMONY OF JOE D. PACE

I. INTRODUCTION

My name is Joe D. Pace. I am an economist and a senior vice president of National Economic Research Associates, Inc. (NERA). NERA is a firm of consulting economists with offices located in White Plains, New York, Washington, D.C., Los Angeles, California, Ithaca, New York, Palm Beach, Florida and London, England.

I received my Bachelor's degree from the College of William and Mary in 1966 and my Master's and Doctoral degrees from the University of Michigan in 1967 and 1970, respectively. I specialized in the areas of industrial organization (antitrust economics) and public utility economics. Prior to joining NERA and while completing the requirements for my doctorate, I taught at the University of Michigan and served as an assistant planner with the Washtenaw County Planning Commission in Ann Arbor, Michigan.

I joined NERA in February 1970. Since that time I have directed or participated in a number of projects dealing with a broad range of antitrust problems, both in regulated and in unregulated industries. I have testified as an expert witness before federal and state regulatory commissions, before federal district courts and before federal and state legislative bodies. A detailed statement of my professional qualifications is appended to this testimony as Attachment 1.

I have been asked by counsel for Monfort of Colorado, Inc. (Monfort) to undertake an economic analysis and form an opinion regarding the markets which are economically relevant to an assessment of the competitive effects resulting from the proposed acquisition of The Spencer Beef Division of Land O'Lakes (Spencer) by Excel Corporation (Excel), to consider how the structure of the relevant markets will be affected by the proposed acquisition and to discuss the potential competitive effects of the proposed acquisition.

II. THE POSITION OF THE PARTIES

As I understand it, the positions of the parties on relevant market definition are as follows. The plaintiff Monfort contends that several markets or submarkets will be affected by the proposed Excel/Spencer acquisition. On the output side, Monfort contends that there exists a market or submarket for boxed beef produced by firms that slaughter and fabricate grain fed steers and heifers. The relevant product includes beef of United States Department of Agriculture (USDA) grade "good" or better from grain fed steers and heifers fabricated by slaughtering packers into primal or subprimal cuts, vacuum packed, boxed and shipped. The claimed geographic market for this product is the United States. Monfort claims that this represents at least a distinct submarket based upon the facts that these firms employ a distinct combined slaughter-fabrication process which results in significant economies, that firms processing beef by separately performing the fabrication function generally are not significant competitors of slaughterer-fabricators and that slaughterer-fabricators recognize one another as a distinct group of competitors.

In the alternative, Monfort contends that a larger market could be defined by including independent fabricators. Further, the plaintiff acknowledges that customer-owned fabricators and other firms breaking and processing carcasses could be argued to be included within the market.

However, in analyzing any more broadly defined market, it would be necessary to recognize the declining and significantly weaker competition offered by firms other than slaughterer-fabricators, which in Monfort's view represent the efficient core of the relevant competitive market.

On the input side, the market claimed by Monfort to be relevant is the market for grain fed steers and heifers. Monfort contends that the broadest geographic market which is relevant encompasses all or parts of 12 states—Nebraska, Kansas, Iowa, Missouri, South Dakota, Wisconsin, Illinois, the high plains region of Oklahoma, Texas and New Mexico, eastern Colorado and southern Minnesota. Local markets for the procurement of grain fed steers and heifers also are claimed to be relevant to assessing the effects of the proposed acquisition.

Defendants' position is that the narrowest relevant market on the output side encompasses all beef produced by firms fabricating or processing cattle for resale to retail outlets, including ground beef, vacuum packed boxed beef, other boxed beef and unboxed cuts below carcass size. The narrowest geographic market for this product, according to the defendants, is the United States, including imports.

The relevant input market cited by the defendants includes all firms that engage in the purchase of cattle for slaughter. The product being procured thus would include fed steers and heifers, nonfed steers and heifers, cows and bulls. The narrowest geographic market, according to the defendants, is the United States east of the Rocky Mountains.

The key points of contention between the plaintiff and the defendants on market definition thus may be summarized as follows.

1. On the output side, does beef of USDA grade "good" or better constitute a separate product (as Monfort claims) or must lower grade beef and ground beef and all firms

that process such beef be included in the market (as Excel claims)?

2. Does the output market or submarket encompass only slaughterer-fabricators, fabricating, vacuum packing and boxing beef or should it include (a) independent fabricators; (b) independent processors not vacuum packing and boxing beef; or (c) customer-owned fabricators?

3. On the procurement side, does the market include only grain fed steers and heifers (as Monfort claims) or should nonfed steers and heifers, cows and bulls be included (as Excel claims)?

4. Does the geographic extent of the procurement market include only the 12 states, as well as other more local areas, claimed by Monfort or is the entire area in the United States east of the Rocky Mountains the narrowest market as Excel argues?

The parties also differ in their views regarding barriers to entry into the relevant markets and the potential competitive effects of the proposed Excel/Spencer acquisition.

III. INDUSTRY BACKGROUND

Of all cattle commercially slaughtered in the United States, approximately 70 percent are grain fed steers and heifers, 8 percent are nongrain fed steers and heifers and the remaining 22 percent are cows and bulls. (Attachment 2.) Only fed steers and heifers can be expected to produce cuts of beef graded USDA "good" or better. At the fabrication level, roughly 80 percent of the value of the fed steers and heifers derives from such USDA "good" or better cuts. Meat trimmings used in ground beef and by-products account for 20 percent of the value. The slaughter of nonfed cattle yields primarily beef for grinding, cuts graded below USDA "good" and by-products. (Attachment 3.)

Fed steers and heifers generally are processed by a distinct group of firms. As an illustration, in 1982 cow

and bull slaughter accounted for under one-third of a percent of the total slaughter by the largest fed cattle slaughterers. (Attachment 4.) Fed steers and heifers routinely are classified and analyzed separately in government and industry statistical compilations and studies. (Attachment 5.)

A relatively small number of states produce the vast majority of fed steers and heifers. Nine states—Colorado, Nebraska, Iowa, South Dakota, Kansas, Texas, Oklahoma, Illinois and Minnesota—account for 77 percent of total fed cattle slaughter in the United States. (Attachment 6.) This reflects the concentration of the nation's corn and milo production (the principal grains used to fatten cattle) in a relatively few states. (Attachment 7.)

The processing of fed steers and heifers to produce the beef cuts utilized by retail stores and by hotels, restaurants and institutions (generally referred to as the "HRI" sector) takes place in several ways. Attachment 8 illustrates this. Slaughterer-fabricators slaughter fed cattle and produce boxed beef generally in a single plant, although in some cases, one plant may slaughter cattle and ship carcasses a short distance to another commonly-owned plant for boxing. As used throughout this testimony, the term "boxed beef" refers to primal or subprimal beef cuts which are fabricated, vacuum packed and boxed for shipment to retailers or distributors. This is identical to the terminology utilized by the Packers and Stockyards Administration (P&S) and is generally recognized in the industry. (Attachment 9.) Firms that engage in such boxing are labelled fabricators. Monfort, Excel and Spencer each are slaughterer-fabricators.

The first significant beef boxing began in the 1960s. Data showing boxed beef production by slaughtering packers is first available for 1971. Attachments 10 and 11 display the rapidly growing role played by slaughterer-fabricators in the processing of fed cattle. From 12 percent in 1971, slaughterer-fabricators increased their share of

all fed cattle processing to 45 percent in 1979 and to 61 percent by 1982. Based on recent additions to slaughterer-fabricator capacity, their share of total fed cattle processing can be expected to rise significantly over 1982 levels.

It should be noted that slaughterer-fabricators also sell carcasses to other fabricators, processors or retail outlets. Mr. Monfort informs me that this results in part from that fact that roughly 10 percent of the cattle purchased by major slaughterer-fabricators are "off-spec" —that is, they do not fit the specifications required for boxing by their purchaser. Such cattle are generally too fat (yield grades 4 and 5), too light, bruised or otherwise damaged. Mr. Monfort further informs me that some of these off-spec cattle ultimately are boxed by independent fabricators, but a significant portion are uneconomic to box and thus are sold to breakers or individual retail outlets.

Boxed beef also is produced by nonslaughtering-fabricators. In some cases, these fabricators are located in slaughtering areas and receive fed cattle carcasses from nearby slaughter or slaughter-fabrication plants owned by other firms. In other cases, the independent fabricators are located in or near major consuming areas such as Boston or New York. Separate slaughter and fabrication facilities mean that additional carcass loading and unloading costs, transportation costs and shrinkage must be incurred, compared to performing slaughter and fabrication in a single facility. Beyond this, labor costs generally are higher in major cities where many independent fabricators are located and the value of by-products tends to be lower.

Data showing the role played by independent fabricators is spotty. A P&S study of production for the year 1979 showed that independent fabricators processed 7 percent of the total fed cattle slaughtered in that year. This was equal to 16 percent of the boxing done by slaughterer-fabricators. My analysis of the current situation, based in significant part on a recent Excel compilation of fabricating capacity by state and owner, indicates that in 1982 non-slaughtering fabricators' capacity was equal to about 20 percent of the capacity of slaughterer-fabricators. Because commercial fabricator capacity tends to be smaller and higher cost than that of slaughterer-fabricators, its share of actual fabrication relative to slaughterer-fabricators probably is smaller than its relative capacity share. Independent fabricators may be estimated to account for some 10 to 12 percent of total fed cattle processing today. (Equal to 17 to 20 percent of the 61 percent processed by slaughterer-fabricators.) This is consistent with the range of estimates for independent commercial fabrication suggested by Excel's president, Mr. Fielding, in his deposition at page 125.

Boxed beef also is produced in customer-owned fabricating plants. The bulk of this captive capacity is owned by Kroger, Winn Dixie and several California chains. Until recently, Safeway also was a major customer fabricator. As is true in the case of commercial fabricators, additional loading, transportation and shrinkage costs are imposed by having fabrication facilities separate from slaughter facilities.

To my knowledge, no study of customer fabrication has been reported. However, my analysis of current fabricating capacity, based largely on the Excel capacity compilation referred to above, indicates that in 1982 customer-owned fabrication capacity equalled approximately 19 percent of slaughterer-fabricator capacity. Again, this capacity tends to be smaller and higher cost and thus probably operates less intensively than large-scale slaughterer-fabricator capacity. A seemingly reasonable estimate is that customer fabricators accounted for 9 to 12 percent of fed cattle processing in 1982. (Equal to 15 to 19 percent of the 61 percent share boxed by slaughterer-fabricators.) Again, this is consistent with the range of estimates provided by Mr. Fielding in his deposition. This percentage can be

expected to drop in 1983 as a result of the closing of most of Safeway's fabrication capacity.

In sum, fabricated, vacuum packed, boxed beef now is estimated to account for 80 to 85 percent of total fed steer and heifer processing. The remaining approximately 15 to 20 percent of fed steers and heifers are slaughtered and either are shipped directly to retail outlets or HRIs as hanging carcass beef, are processed into primal or subprimal cuts by breakers or processors who do not vacuum pack and box the output, or are damaged cattle that are ground up. The latter category may encompass 1 to 2 percent of fed cattle production. Precise figures showing carcass shipments directly to individual outlets for in-store breaking and cutting are unavailable. However, the most reasonable estimate seems to be that around 10 percent of total fed cattle are slaughtered and shipped direct to individual outlets as carcass beef. This figure is consistent with the latest annual survey data published by Cryovac concerning retail beef distribution. (Attachment 12.) It is also consistent with Mr. Monfort's view and with an Excel estimate made in January 1982. (Attachment 13.)

According to Excel's own documents, the economic disadvantages of carcass processing at the store as contrasted with slaughter-fabrication are overwhelming. (Attachment 14.) Excel figures indicate that the direct cost per pound to the retailer is 8.3 percent lower when boxed beef is utilized rather than carcass beef. These same figures indicate that, all else being equal, the price of boxed beef at the slaughter-fabrication plant could be increased over 11 percent (or $77.00 per head) before the economic advantages of boxed beef would be dissipated. The magnitude of this comparative economic advantage can best be understood when it is recognized that typical slaughter-fabrication before-tax profit margins are only 1 to 2 percent of sales, or $7.00 to $14.00 per head. (Attachments 15 and 16.) The economic advantages of boxed beef and the sources of these advantages—lower transportation costs,

less shrinkage, longer shelf life and lower labor costs—are widely recognized in the industry. (Attachment 17.)

Total in-store carcass processing of fed steers and heifers has declined continuously to an estimated 10 percent today. The remaining carcass processing, despite the general economic superiority of boxing, seems to be accounted for in substantial part by the utilization of off-spec cattle, by local processing of local slaughter and by union rules preventing the use of boxed beef.

The remaining 3 to 5 percent of fed cattle processing apparently is accounted for by independent or customer-owned processors who break carcasses into primal and subprimal pieces for distribution to individual retail outlets but do not vacuum pack the cuts. The absence of vacuum packaging limits the shelf life of the beef cuts. Thus, such processors would tend to be located near their retail customers. Mr. Monfort informs me that in his judgment, such processors will tend to be quite small and will process local slaughter or off-spec fed cattle.

USDA grade "good" or better beef from fed steers and heifers is distributed nationwide. Imports and exports of such beef are insignificant. The Meat Import Act places limits on total imports of beef and veal. In 1981, imports equalled only 7.7 percent of domestic beef and veal production. (Attachment 18.) Further, such imports are concentrated in processed beef and nonfed lower grades of beef. Exports likewise are limited. In 1981, only 1.1 percent of total U.S. beef and veal production was exported. A 1982 USDA study (utilizing data for fourth-quarter 1979) revealed that only 0.7 percent of boxed beef was exported. Numerous limitations on beef exports exist, including the imposition of substantial trade barriers, the absence of high income markets and the absence of developed tastes for grain fed beef.

IV. THE DEFINITION OF MARKETS ECONOMICALLY RELEVANT TO ASSESSING THE POTENTIAL COMPETITIVE EFFECTS OF THE PROPOSED EXCEL/SPENCER ACQUISITION

A. The Standards Utilized by Economists for Defining Relevant Markets

In broad terms, economists think of a market as an arena within which buyers and sellers engage in the exchange of a good or service. In order to define a particular market, it is necessary to establish its specific product and geographic dimensions. Product market boundaries are delineated by examining demand substitutability (realistic substitutability among products as viewed by users) and short-run supply substitutability (the ability of firms to shift the personnel and equipment used in supplying one good into the furnishing of a second good). Geographic market boundaries are defined to include the area over which users realistically can turn for alternative sources of substitutable products or, in some cases, the area over which sellers operate. The objective of the market analysis is to recognize buyer alternatives and alternative sources of supply which significantly constrain the ability of a given firm or group of firms to exercise monopoly power over users.

When the concern is with the potential exercise of power by buyers over sellers (labelled "monopsony power" by economists), the focus on the existence of alternative buyers to which the sellers can turn (the demand side) and on the ability of sellers to divert their skills and resources readily to the production of other commercially viable products (the supply side).

Because real-world markets tend to be characterized by products and processes of varying degrees of substitutability, it is generally recognized that market boundaries may be difficult to define unambiguously. However, it is also recognized by economists that a precise fixing of the market boundary may not be important if a careful analysis of market power is conducted. Thus, one may choose to include an imperfect substitute in the market but recognize that it has a limited constraining effect on other suppliers in the marketplace. Alternatively, the imperfect substitute may be excluded from the market definition because of its limited constraining effect. The conclusions regarding the market power possessed by suppliers of the product in question should be unaffected by the path taken.

It is important to stress that realistic substitutability is the touchstone of the economist's approach to market definition. In defining markets, the concern is not with products that could be substituted for one another or products that are possible substitutes, but with commercially realistic substitutes. Likewise, markets are not defined by isolated instances of substitutability. Economists are concerned with what constrains the behavior of firms in a market and what leads to good performance from the consumer's point of view. Isolated instances that do not affect behavior or performance significantly are unimportant. Finally, the stress on realistic substitutability emphasizes that institutional limitations on substitutability can be of paramount importance in delineating relevant markets. For example, the fact that users would purchase a new drug with therapeutic powers similar to those of existing drugs would not lead one to include the new drug in the market if it had not been approved by the Food and Drug Administration for general use.

When analyzing the potential competitive effects of a proposed horizontal merger, the "relevant" market from the point of view of the economist is determined by beginning with the product and geographic scope of the businesses in which the acquiring and acquired companies are engaged, in order to identify the competitive overlap between them. Then, the boundaries of the relevant market are expanded as appropriate to reflect demand and short-run supply substitutability.

B. The Competitive Overlap Between Excel and Spencer

Excel proposes to acquire from Spencer two beef slaughter-fabrication plants and one slaughter-only plant. Each Spencer plant utilizes as its primary input grain fed steers and heifers. The primary output of the two fabrication plants is USDA grade "good" and better beef fabricated into primal or subprimal cuts, vacuum packed and boxed. Such boxed beef is shipped throughout the United States. Spencer's three plants are located in Spencer, Iowa, Oakland, Iowa and Schuyler, Nebraska. Fed steers and heifers generally are purchased from commercial feedlots and farmer feeders located within 200 miles of the slaughter or slaughter-fabrication plants. (See Section C below.) Typical fed cattle procurement areas for Spencer's plants thus would include Nebraska, South Dakota, Minnesota, Iowa, Missouri and Kansas.

Excel now owns four beef slaughter-fabrication plants, one fabrication-only plant and one slaughter-only plant. Each slaughter-fabrication plant utilizes as its primary input grain fed steers and heifers and yields as its primary output USDA grade "good" and better fabricated, vacuum packed, boxed beef. Excel's boxed beef is shipped throughout the United States. Excel's slaughter-fabrication plants are located in Rockport, Missouri, Friona, Texas, Plainview, Texas and Dodge City, Kansas. The slaughter-only plant is located in Cozad, Nebraska. The fabrication-only plant is located in Wichita, Kansas. Typical fed cattle procurement areas for Excel's slaughter and slaughter-fabrication plants include Nebraska, South Dakota, Iowa, Missouri, Kansas, Oklahoma, Texas, New Mexico and Colorado. (See Section C below.)

Two major areas of competitive overlap between the acquired and acquiring firm thus are apparent. Both are slaughterer-fabricators that produce and market boxed beef in competition with one another throughout the United States. Given this, to utilize the language of the U.S. De-

partment of Justice merger guidelines, one "provisional" relevant market is the market for boxed beef and the geographic scope of that market is the United States. A second provisional relevant market is the market for the procurement of fed steers and heifers. Clear areas of competitive overlap exist between Excel and Spencer in the procurement of fed steers and heifers in the states of Nebraska, South Dakota, Iowa, Missouri and Kansas. The next few sections of my testimony address whether these provisional market boundaries should be expanded along the lines suggested by the defendant when demand and short-run supply substitutability is taken into account.

C. The Definition of the Relevant Beef Processing Market

Plaintiff and the defendants agree that the geographic scope of the relevant beef output market encompasses the United States. Defendants contend that imported beef should be included in the market. The plaintiff's position is that imports of the relevant product are virtually nonexistent. Since the geographic market definition is not in fundamental dispute by the parties and since a nationwide definition is consistent with boxed beef and carcass shipment patterns, the geographic dimension of the output market will not be discussed further in my testimony.

As earlier noted, the beef processing product market disagreement between the parties centers on several points: (1) whether beef cuts of USDA grade "good" or better constitute a product distinct from lower grade cuts and ground beef; and thus whether fed cattle processors operate in a market distinct from cow and bull and nonfed processors; and (2) whether there exists an output market or submarket encompassing only slaughterer-fabricators or must the market include independent fabricators, independent processors not vacuum packing and customer-owned facilities. Each of these points is addressed below.

Only a small fraction of beef cuts processed in the United States grade below USDA "good" or its equivalent. (Attachment 19.) Major retail chain stores and HRIs typically

will not accept beef cuts graded less than USDA "good" or its equivalent derived from grain fed steers and heifers. Neither Monfort nor Excel produce any beef cuts graded less than "good." (Fielding deposition, pages 61-62.) Given that major customers and suppliers do not view lower grade beef cuts as substitutable for "good" or better grades, I conclude that beef graded USDA "good" or better is a distinguishable product. Stated differently, there is no evidence that beef graded "standard" or below derived from the slaughter of cows and bulls or nonfed cattle could place a significant competitive constraint on suppliers of "good" or better graded beef.

The substitutability of ground or processed beef for beef cuts of USDA grade "good" or better also must be considered. Ground beef is furnished in significant part by a distinct group of suppliers. Data for 1977 reveal that 41 percent of ground beef came from cow and bull slaughter, 13 percent was imported, 11 percent was from nonfed steer and heifer slaughter, and the remaining 35 percent was derived from fed steer and heifer slaughter. The relevant question is whether ground beef is sufficiently substitutable by consumers for good table cuts of beef so as to prevent suppliers of "good" or better quality beef from exercising market power. It is useful to bear in mind when addressing this question that an increase in the retail price of beef cuts of USDA grade "good" or better of even 2 percent, all else being equal, would represent an exercise of market power doubling slaughterer-fabricator profits. Several factors suggest that the substitutability of ground beef for good table cuts is not so great as to prevent a substantial exercise of market power by suppliers of "good" or better grades of beef.

First, almost half the total beef and an even greater portion of the ground beef consumed in the United States is taken by the HRI sector. The demand for such beef is in large part a demand derived from restaurant eating choices made by ultimate consumers. Such choices cannot

be expected to be sensitive to wholesale meat price changes. An increase of 5 percent in the price of USDA "good" or better table cuts supplied to HRIs may change the menu price seen by the consumer by no more than 1 percent. Likewise, a 5 percent change in the price of ground beef would affect retail hamburger prices at fast food establishments by no more than a couple of cents. It does not seem plausible to argue that restaurant beef consumption patterns would change in response to such price changes.

Second, limited data suggest that the prices of ground beef and choice beef do not in fact move together. For example, over the seven-year period 1971-1978, the price of hamburger declined during two years while choice beef prices increased or remained constant, and hamburger prices remained constant during one year while choice beef prices fell. (Attachment 20.) Further, Mr. Monfort informs me that the prices of meat trimmings going into ground beef "march to a different drummer" and are more sensitive to cow beef and pork prices. In fact, trimmings and boxed beef prices sometimes may move in opposite directions in that the higher the price is for trimmings and fat used in ground beef, the lower is the breakeven price that must be received for boxed beef. Forward prices are offered for boxed beef but not for trimmings because trimmings prices are less predictable. Mr. Monfort further stated that in his judgment a change in the relative prices of boxed beef and ground beef of plus or minus 10 percent would cause little shifting of demand between them.

The cross-elasticity of demand between choice beef cuts and ground beef or between fed and nonfed beef has been estimated in several studies. In general, the cross-elasticities identified are low, suggesting that all else being equal, a price reduction of 10 percent in ground beef or nonfed beef prices would lead to a reduction of only 2 to 3 percent in the demand for choice or fed beef.

Based upon these facts, I conclude that beef cuts of USDA grade "good" or better constitute an economically distinct product. The broadest output market relevant to the assessment of the proposed Excel/Spencer acquisition would encompass only firms engaged in the fabrication or processing of such beef.

It seems clear that the direct receipt of carcasses for in-store breaking and cutting is so uneconomic as to present no competitive alternative to fabricated or processed beef. Excel's own analysis (Attachment 14) shows that, all else being equal, in-store carcass processing is so uneconomic that slaughterer-fabricator profit margins could be increased at least fivefold before carcass processing would present an effective competitive alternative. In-store carcass processing thus can be excluded from a reasonably defined market as it provides no realistic alternative to the vast majority of customers.

As noted in Section III above, alternatives theoretically available to individual retail outlets include: (1) purchasing from local processors who break carcasses into primal or smaller pieces but do not utilize vacuum packaging; (2) engaging in local processing at a central customer-owned facility; (3) fabricating and boxing beef at larger customer-owned facilities for redistribution to stores over a wider area; and (4) purchasing from independent fabricators or slaughterer-fabricators. In order to determine which firms among these various groups operate as significant competitive checks on one another, it is necessary to explore further the relative economics of the various processes.

Small-scale local processing of fed cattle carcasses continues to exist in the market. Limited marketing areas make the use of vacuum packaging unnecessary. Such firms may provide a useful service processing local slaughter or by processing off-spec fed cattle for distribution to local retailers but it seems implausible that they could economically expand output by procuring carcasses and distributing processed beef over larger areas so as to provide a

significant competitive check on larger boxed beef suppliers.

The production of boxed beef in large-scale plants in or near major fed cattle slaughtering areas is clearly recognized in the literature as well as in Excel documents as providing a more cost-effective processing system than moving carcasses from the slaughter area to major consuming areas for local processing. Transportation and shrinkage costs are lower, labor costs tend to be lower in slaughtering areas, sanitation is improved and centralized plants are generally better able to use by-products. The market clearly has validated the economics of centralized boxing which now accounts for an estimated 80 to 85 percent of all fed cattle processing and 90 to 94 percent of all processing services supplied to individual stores.

Even within the category of all boxed beef suppliers, there exist wide disparities. This is true because the slaughter and fabrication processes are characterized by significant economies of scale and economies of vertical integration. Mr. Monfort has informed me that in his judgment, the minimum efficient scale for a combined slaughter-fabrication plant is 1,500-head per shift and that a 500-head per shift plant can be expected to incur slaughter-fabrication costs $6.00 to $7.00 a head higher. Mr. Monfort further states that significant economies are available by operating two shifts a day. Thus, a double-shifted 3,000 head a day plant could be expected to provide additional slaughter-fabrication cost reductions of $9.00 per head. Economies of vertical integration also exist. The estimated cost penalty associated with separate slaughter and fabrication facilities is $5.00 to $7.00 a head even if the facilities are in close proximity.

Mr. Monfort's views are consistent with industry practice. Of the 17 beef boxing plants owned by the five leading fabricators, 16 are combined slaughter-fabrication facilities. Five have capacities exceeding 4,000 head a day, nine have capacities of 2,500 or more but less than 4,000

head a day, and the remaining three have capacities between 1,500 and 2,500 head a day. In addition, the two new plants recently opened by Val Agri each are combined slaughter-fabrication facilities expected to have a capacity of 2,500 head a day.

Excel's documents confirm the view that large size and vertical integration are required to achieve acceptable costs. Cargill reports express the view that the advantages of integration are so great that no future facilities will be built without combined slaughter and fabrication capacity. Moreover, a continued trend toward boxed beef and the virtual elimination of independent fabricators is predicted. (Attachment 21.)

In light of the prevailing economics and the resulting trend toward large-scale slaughterer-fabricator facilities, it seems clear that the real competitive forces in beef processing revolve around large fabricators and more specifically around large integrated slaughterer-fabricators. Regardless of how one choses to define the market, therefore, the relevant inquiry into the potential for exercising market power should focus on this more narrow group of firms.

Whether captive capacity owned by retail customers should be included in the relevant market turns on a similar consideration. The argument for including such capacity is that the same final product is produced. The argument for excluding captive capacity is that such capacity is not available as an alternative source of supply to customers of commercial fabricators. In this case, an additional argument for excluding customer capacity is that that capacity tends to be concentrated in relatively small uneconomic plants. Its continued use is justified in part on the ground that special cuts not supplied by commercial fabricators are supplied by the captive capacity. This strengthens the argument for excluding customer capacity from the market viewed as relevant for assessing the competitive effects of the proposed Excel/Spencer acquisition.

In summary, I conclude that the output market definition urged by the defendants is too broad to be meaningful in that it includes all processors of lower grade and ground beef. The broadest market definition that seems at all useful would encompass all firms engaging in the fabrication or processing of fed cattle. If this alternative were adopted, however, it would be critical to recognize that a substantial group of suppliers in the market so defined do not and could not provide a competitive check on large slaughterer-fabricators, either because the processes they employ are inherently uneconomic, because they cannot expand supply substantially at reasonable costs or because their capacity is dedicated to retail customer-owners. In measuring and analyzing the larger market, the focus should be on the distribution of cost-effective large-scale fabrication capacity. An analysis of capacity and production data relating to slaughterer-fabricators and independent fabricators clearly would seem broad enough to encompass all significant competitors.

The group of slaughterer-fabricators proffered as a distinct market or submarket by the plaintiff does constitute an economically meaningful subgroup for analysis. The firms found in that group utilize large-scale combined slaughter-fabrication facilities offering significant economies. Both Monfort and Excel appear to recognize such packer-boxers as a distinct competitive group. (Attachment 22.)

D. The Definition of the Relevant Procurement Market

Two questions are addressed here. First, does the market include only grain fed steers and heifers or should nonfed steers and heifers, as well as cows and bulls be included? Second, does the geographic extent of the procurement market include only at the widest a 12-state area as well as more local areas claimed by Monfort, or is the entire area in the United States east of the Rocky Mountains the narrowest market?

On the first question, I conclude that grain fed steers and heifers clearly constitute a separate economically relevant product market for the purpose of evaluating potential competitive effects resulting from the proposed acquisition of Spencer by Excel. There are no demand or supply substitutes for grain fed steers and heifers. Beef fabrication plants and carcass processors must have fed steers and heifers as inputs in order to produce beef with a consistent quality of USDA "good" or above. Cows and bulls and nonfed cattle will not substitute. Instead, those cattle are utilized by a separate group of packers employing different plants and equipment to produce processed meat and ground beef. (Attachment 3.) Excel and Monfort each utilize only grain fed steers and heifers as inputs to their beef slaughter fabrication process.

The defendants apparently argue that the market should encompass all cattle slaughter because of short-run supply substitutability between fed and nonfed cattle slaughter. Specifically, the defendants contend that firms now slaughtering nonfed cattle could and would shift their facilities to fed cattle slaughter if margins in that business increased as a result of an attempt by fed cattle slaughterers to depress fed cattle prices or raise boxed beef prices. In addressing this argument, whether the existence of nonfed cattle slaughterers places a significant competitive check on fed cattle slaughters is the relevant question. For several reasons, I conclude that it does not. First, fed and nonfed cattle slaughter are concentrated in different sections of the country. For example, while cow and bull slaughter accounts for 23 percent of commercial cattle slaughter nationwide, it accounts for only 9.5 percent of total slaughter in Iowa, Kansas, Nebraska and Missouri. (Attachment 23.) In the 12-state area to be discussed below, cow and bull slaughter accounts for 15.7 percent of the total, but is heavily concentrated in eastern Texas and the dairy cattle regions of Wisconsin and Minnesota. Much cow and bull slaughter capacity therefore would be poorly

located, thus limiting its ability to compete for fed cattle. Beyond this, even if a shift of 20 percent of all nonfed slaughtering capacity to fed cattle slaughtering were economically feasible, total fed cattle slaughtering capacity in the 12-state region would increase by only 3 percent.

Second, cow and bull slaughter plants tend to be smaller than fed cattle slaughter plants. Excel's own document suggests that optimal cow and bull slaughter plant sizes are 600 to 800 head a day. (Attachment 24.) Major fed cattle slaughtering plants typically are twice that size. Given plant size disparities and the existence of substantial economies of scale in slaughtering (discussed further in my testimony below), it does not seem plausible to argue that cow and bull slaughter plants present a commercially competitive alternative for the slaughter of fed cattle.

Third, Mr. Monfort has testified that cow and bull slaughterers lack the fed cattle buyers network, the marketing contacts and the sizes and types of slaughter plants required to achieve reasonable fed cattle slaughter costs. (Monfort deposition, pages 57-58.)

Finally, cow and bull slaughterers in most cases lack fabrication facilities. Thus, most cow and bull slaughterers who might consider switching to fed cattle slaughter would have to market their output in a relatively uneconomic manner by shipping carcasses.

For these reasons, I conclude that there exist no significant demand or supply substitutes for fed steers and heifers and that the procurement of such cattle is a relevant market within which to evaluate the effects of the proposed Excel/Spencer acquisition.

The geographic market for the procurement of fed cattle clearly is regional in scope. Mr. Monfort has provided me with estimates showing that the additional cost of transporting fed cattle an additional 100 miles (for example, from 250 miles away rather than 150 miles) is $3.85 a

head. This estimate is corroborated by the deposition testimony of Mr. Knobbe, a cattle feeder called as a witness by Excel in this proceeding. (Knobbe deposition, page 50.) The significance of this extra cost can be appreciated by contrasting it with the typical before-tax slaughter profit margins of $7.00 to $14.00 a head.

A 1975 P&S study of slaughter plants in Iowa, Minnesota, Nebraska, Kansas, Oklahoma, Texas and New Mexico showed that over half of the cattle were purchased within a 75-mile radius of the plant and almost three-quarters were purchased within a 150-mile radius. (Attachment 25.) These procurement patterns have been confirmed in a more recent study. A December 1981 study based upon July 1979 cattle procurement showed that 80 to 85 percent of all cattle were purchased within 150 miles of the slaughter plant. Virtually all remaining purchases were made between 150 and 250 miles of the plant. (Attachment 26.) Deposition testimony of several witnesses in this case further confirms these estimates. Mr. Knobbe stated that 95 percent of his fed cattle are sold within 130 miles of the feedlot. (Knobbe deposition, page 27.) Mr. Weber, another cattle feeder called as a witness by Excel, testified that 95 percent of his cattle are sold within 110 miles of his feedlot. (Weber deposition, pages 34-35.) And, Mr. Smith, Excel's Vice President in charge of cattle procurement, stated that a normal buying area for a procurement plant is closer to 200 miles than to 150 miles. (Smith deposition, pages 80-81.)

Excel's own documents point to the localized nature of fed cattle procurement.

* * * *

[Sentence Deleted Refers to Information Subject to Protective Order; For Complete Text See Sealed Joint Appendix]

Numerous Excel documents analyzing fed cattle procurement areas for actual or contemplated slaughter-fab-

rication plants focus on the demand and supply of such cattle within a 50-, 100- and 150-mile radius. (Attachment 28.) Finally, Excel's "procurement area" map identifies portions of 10 states as its procurement area, including the panhandle region of Texas, Oklahoma and New Mexico, as well as Colorado, Kansas, Nebraska, Iowa, Missouri, Southern Minnesota and the southeast corner of Wyoming. (Attachment 29.)

As a reasonable generalization, therefore, the outer boundaries of fed cattle procurement areas directly affected by the acquisition of Spencer by Excel may be delineated by placing a circle of roughly a 200-mile radius around each slaughter and slaughter-fabrication plant owned by Spencer and Excel and identifying the overlaps between the Spencer and Excel circles. That analysis indicates that procurement in Nebraska, South Dakota, Iowa, Missouri and Kansas plainly will be affected. (Attachment 30.) Cattle feeders located in any of those areas will have one less major buyer with which to deal if the acquisition is consummated. In order to assess fully the competitive effects on fed cattle procurement in the Excel/Spencer overlap area, it must be recognized that feeders in that area typically could turn to other packer-buyers up to 200 miles away from the feedlots. Similarly, slaughterers located within the overlapping Excel/Spencer procurement area typically could turn for fed cattle supplies to feedlots located up to 200 miles from the overlap area. This larger area is depicted on Attachment 31. It covers principally the states of Nebraska, South Dakota, Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kansas, Colorado and Oklahoma.

The area identified in Attachment 31 is very similar to the areas defined in the recent USDA staff report on fed cattle markets as the high-and-medium-density fed cattle core areas of the United States. (Attachment 32.) All or parts of 12 states are included in these regions—Nebraska, South Dakota, southern Minnesota, Wisconsin, Iowa, Il-

linois, Missouri, Kansas, eastern Colorado, and the panhandle region of Texas, Oklahoma and New Mexico. These regions were delineated by identifying cores of high-density fed cattle marketing surrounded by low-density feeding areas. Given the importance to the industry of fed cattle transportation costs, this provides a sensible approach to defining regional markets. The high-and medium-density areas identified in the USDA staff report account for 74 percent of all fed cattle marketings in the United States.

In my opinion, those areas clearly constitute the broadest geographic market within which it would be reasonable to assess the effects of the proposed Excel/Spencer acquisition on the procurement of fed cattle. This 12-state area corresponds closely to Excel's own description of its procurement area (Attachment 29) with the states of Wisconsin and Illinois added to the east because of their proximity to the Spencer plants being acquired. Viewed differently, the only states with significant fed cattle marketings excluded from the market given these geographic boundaries are California, Arizona, Washington, Oregon, Idaho to the west and Indiana, Michigan and Ohio to the east. These states clearly fall outside the fed cattle procurement areas of the Spencer or Excel plants.

A more conservative but nevertheless reasonable approach to market definition could be derived by examining cattle procurement within a 150-mile radius of each relevant slaughter plant. On average, 80 percent of all cattle procurement takes place within an area of that size. As Attachment 33 shows, using the 150-mile standard, the Excel/Spencer procurement overlap area would include eastern Nebraska, western Iowa, and northern Missouri and Kansas. Recognizing additional buyers and sellers located within 150 miles of the overlap area would expand the market to be examined to encompass Nebraska, Iowa, Kansas, southern Minnesota, most of Missouri and South Dakota. (Attachment 34.)

As shown in Attachments 35 and 36, the normal procurement area for Monfort's Grand Island plant coincides generally with the overlapping Excel/Spencer procurement areas which may be directly affected by the proposed acquisition.

Because of the localized nature of fed cattle procurement, it may be appropriate to define even smaller markets within the 12- or six-state region which are relevant to assessing the potential competitive effects of the proposed Excel/Spencer acquisition, although placing precise boundaries on such local markets is difficult. For example, Excel's own documents frequently refer to the "western corn belt area," including eastern Nebraska, western Iowa and southern Minnesota. A key reason provided by Excel for its decision to acquire Spencer is to take advantage of regional differences in fed cattle prices ranging as high as $10.00 to $30.00 a head for six to eight months each year between the "western corn belt area" and the high plains area. (Attachment 37.)

In summary, on the procurement side, I conclude that both the product and geographic market boundaries urged by the defendants are overly broad. Instead, I conclude that the relevant procurement market for assessing potential competitive effects of the proposed Excel/Spencer acquisition includes only the procurement of fed steers and heifers. The broadest geographic market which is reasonable to examine includes all or parts of 12 high- and medium-density cattle feeding states. It also would be reasonable to define the outer limits of the relevant procurement market as encompassing five states and significant parts of two others. In either case, as a part of the analysis of the potential competitive effects of the proposed acquisition on fed cattle procurement, it would be reasonable to focus on smaller market areas.

V. CONCENTRATION TRENDS AND THE EFFECT OF THE PROPOSED EXCEL/SPENCER ACQUISITION ON THE RELEVANT MARKETS

A. The Output Markets

The production of boxed beef by slaughterer-fabricators now is highly concentrated and concentration has been increasing in the past five years. Four, eight and 20 firm concentration ratios for slaughterer-fabricators are set forth below and in Attachment 38.

Table 1
Four, Eight and 20 Firm Concentration Ratios Boxed Beef Produced in the United States by Slaughterer-Fabricators 1979-1982

Year	Four Firm Concentration	Eight Firm Concentration	20 Firm Concentration
	(percent)		
	(1)	(2)	(3)
1979	58.3%	72.9%	94.5%
1980	60.0	76.8	95.6
1981	62.7	78.4	96.5
1982	64.4	81.1	97.4
Post Merger	71.3%		

As shown on Table 2 below (also Attachment 39), the slaughter-fabrication industry today is dominated by two firms—IBP is the largest, followed closely by Excel. In 1982, Spencer was the third largest, followed by Swift and Monfort.

Table 2
Boxed Beef Produced in the United States by the Five Largest Slaughterer-Fabricators 1982

Firm	Boxed Beef Production	Share of Total
	(carcass equivalent)	(%)
	(1)	(2)
IBP	4,963,237	32.6%
Excel	2,575,987	16.9
Spencer	1,150,467	7.6
Swift	1,106,000	7.3
Monfort	1,042,224	6.9
Total Industry	15,207,156	100.0%

The acquisition of Spencer by Excel thus will increase the four firm slaughterer-fabricator concentration ratio (based upon 1982 production data) from 64.4 to 71.3 percent. Equally significant, two firm concentration will increase from 49.5 to 57.1 percent.

Another measure used to reveal industry concentration is the Herfindahl-Hirschman Index (HHI). The HHI is produced by summing the squares of the market shares of individual firms. [The HHI for an industry consisting of four equal-sized firms would be 2,500 (25^2 or 625 times 4).] All else being equal, the smaller the number of firms in an industry or the more disparate individual firm sizes, the higher will be the HHI. Current Department of Justice merger guidelines view mergers yielding an HHI above 1,800 and resulting in increases of greater than 100 as presumptively anticompetitive. Based on 1982 data, the post Excel/Spencer acquisition HHI for boxed beef pro-

duced by slaughtering packers will be 1,823 and the proposed acquisition will increase the HHI by 257. As discussed in Section C above, the firms falling into the slaughterer-fabricator category operate as the main competitive checks on one another and thus would appear to constitute at least a relevant subgroup for analysis.

Expanding the market measurement to include boxed beef supplied by independent fabricators results in somewhat lower market share and concentration estimates. As noted above, independent fabricators can be estimated to have accounted for between 10 and 12 percent of total commercial fed cattle processing in 1982. This would amount to boxed beef production on a carcass-equivalent basis of between 2.5 million and 3.0 million head in 1982. Estimated concentration levels and individual firm market shares, when a 3.0 million head allowance is made for independent fabrication, are set forth on Table 3 below. (Also in Attachment 40.)

Table 3
Production of Boxed Beef by Five Largest Packers as a Percent of Estimated Total Production by Slaughterer-Fabricators and Independent Fabricators
1982

Firm	Boxed Beef Production	Market Share
	(carcass equivalent)	(%)
	(1)	(2)
IBP	4,963,237	27.3%
Excel	2,575,987	14.1
Spencer	1,150,467	6.3
Swift	1,106,000	6.1
Monfort	1,042,224	5.7
Total Industry	18,207,156*	100.0%

* Includes estimated 3.0 million carcass equivalent production by independent fabricators.

The acquisition of Spencer by Excel thus will increase the four firm boxed beef concentration ratio (Based upon 1982 production data) from an estimated 53.8 to 59.5 percent. Even in this more broadly defined market, after the merger, IBP and Spencer/Excel together would account for 47.7 percent of estimated 1982 production.

For completeness, Table 4 below (also Attachment 41) presents production market shares for the broadest plausible market definition. The denominator used in these computations is 22 million head, which accounts for over 88 percent of total fed cattle marketings in 1982. This provides an estimate of all fed cattle fabricated or processed prior to delivery to individual retail outlets.

Table 4
Production of Boxed Beef by Five Largest Packers as a Percent of Estimated Total Fed Cattle Processing for Retail Outlets
1982

Firm	Boxed Beef Production	Market Share
	(carcass equivalent)	(%)
	(1)	(2)
IBP	4,963,237	22.6%
Excel	2,575,987	11.7
Spencer	1,150,467	5.2
Swift	1,106,000	5.0
Monfort	1,042,224	4.7
Total Industry	22,000,000	100.0%

The acquisition of Spencer by Excel will increase the four firm fed cattle processing concentration ratio from an estimated 44.5 percent to 49.2 percent. As indicated

above, concentration figures computed for such a broadly defined market mask important differences in the ability of various firms within the market to serve as significant competitive checks.

As I understand it, the defendants argue that market shares can be meaningfully analyzed in terms of the capacity owned by various participants in the market. I agree with the reasonableness of this approach, but if market power inferences are to be drawn from the resulting shares, some effort must be made to distinguish high-cost capacity which provides little or no competitive check on other firms from low-cost competitive capacity. In the case at hand, as discussed above, Mr. Monfort has informed me that at a minimum, a 1,500 head a shift slaughter-fabrication plant is needed to achieve reasonable costs today. The defendants apparently will contend that a 1,200 head a day fabrication-only plant can achieve reasonable costs. In light of that, I have attempted to develop a conservative estimate of the distribution of efficient sized fabrication capacity by including all fabrication facilities having a capacity of 1,000 head a day or more. Table 5 below (also Attachment 42) summarizes the results.

Table 5
Shares of Fabrication Plants With Reported Capacities Exceeding 1,000 Head A Day
1983

Firm	Daily Fabrication Capacity	Capacity Share
	(carcass equivalent)	(%)
	(1)	(2)
IBP	20,000	27.5%
Excel	14,950	20.6
Monfort	5,800	8.0
Swift	5,500	7.6
Spencer	5,700	7.8
Total Industry	72,650	100.0%

Several points are noteworthy. First, the proposed Excel/Spencer acquisition would increase the four firm concentration of efficient fabrication capacity defined in this way from 63.9 to 71.5 percent. Second, the acquisition would provide Excel with capacity equal to that of IBP. IBP and Excel together would account for 56 percent of the industry's efficient capacity. Third, other than the firms shown, only Val Agri owns more than a single efficient size fabrication plant. Finally, it is significant to note that the plants included in this tabulation have enough capacity taken together to supply all the beef currently boxed by commercial slaughterer-fabricators and independent fabricators. Operating an average of 260 days a year, the over 1,000 head a day plants could fabricate almost 19 million head a year. This indicates that significant future expansion by existing or new firms increasingly will be possible only by wresting market share away from existing firms employing relatively efficient large-scale capacity.

B. Procurement Markets

Concentration in the procurement of fed cattle in the broad 12-state geographic market has been rising rapidly and will increase sharply if the proposed Excel/Spencer acquisition is consummated. Table 6 below (also Attachment 43) sets forth four, eight and 20 firm concentration for the states of Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wisconsin. (It should be noted that slaughter statistics are equivalent to procurement data since all fed cattle procured by packers are slaughtered.) The four firm concentration ratio trend is plotted in the chart appended as Attachment 44. It should be noted that these ratios understate concentration in the relevant 12-state market by including all steer and heifer slaughter rather than fed steer and heifer slaughter only and by including all slaughter in Texas, Oklahoma, New Mexico, Colorado and Minnesota, rather than including slaughter

or procurement only in the relevant portions of those states.

Table 6
Four, Eight and 20 Firm Concentration Ratios
Steer and Heifer Slaughter in 12-State Market Area
1976-1982

Year	Four Firm Concentration	Eight firm Concentration	20 Firm Concentration
	——————(percent)——————		
	(1)	(2)	(3)
1976	36.1%	52.3%	74.0%
1977	35.6	52.2	74.4
1978	37.3	52.2	74.8
1979	43.1	60.1	79.9
1980	44.2	63.1	82.3
1981	50.2	68.5	87.1
1982	52.0	NA	NA
Post Merger	57.5%		

NA—not available

Note: Data for 1976 through 1981 were supplied directly by P&S. The estimate for 1982 is based upon slaughter data for IBP, Excel, Spencer, Monfort and Swift.

As the table shows in the last five years alone, the four firm concentration ratio has increased by 15 percentage

points, from 37.3 to 52.0 percent. Completion of the proposed Excel/Spencer acquisition will increase the four firm concentration ratio to 57.5 percent.

Individual firm procurement market shares for 1982 are shown below. (See also Attachment 45.)

Table 7
Steer and Heifer Slaughter and Procurement Market Shares
12-State Area
1982

Firm	1982 Slaughter	Procurement Market Share
	(000 head)	(%)
	(1)	(2)
IBP	5,171	24.4%
Excel	2,815	13.3
Spencer	1,503	7.1
Swift	1,515	7.2
Monfort	1,157	5.5
Total in 12 States	21,153	100.0%

As Table 7 indicates, after the merger, IBP and Excel/Spencer together would account for 44.8 percent of all steer and heifer slaughter in the 12-state area.

Tables 8 and 9 below (also Attachments 46 and 47) recalculate the four firm procurement concentration ratios and 1982 individual firm market shares by focusing on fed steer and heifer marketings rather than all steer and heifer slaughter and by estimating the fed cattle marketings in the portions of the 12-state area included in the relevant market as I have defined it.

Table 8
Four Firm Fed Cattle Procurement Concentration Ratios in 12-State Area, Excluding Portions of Texas, Oklahoma, New Mexico, Minnesota and Colorado
1979-1982

Year	Percent
	(%)
1979	45.5%
1980	49.7
1981	56.5
1982	59.0
Post Merger	65.2%

Table 9
Fed Cattle Slaughter and Procurement Market Shares in 12-State Area, Excluding Marketings in Portions of Texas, Oklahoma, New Mexico Minnesota and Colorado
1982

Firm	1982 Slaughter	Procurement Market Share
	(000 head)	(%)
	(1)	(2)
IBP	5,171	27.7%
Excel	2,815	15.1
Spencer	1,503	8.1
Swift	1,515	8.1
Monfort	1,157	6.2
Total in 12 States	18,662	100.0%

Viewed on this basis, the proposed Excel/Spencer acquisition will increase four firm concentration from 59.0 to 65.2 percent and increase tne two firm market share from 42.8 to 50.9 percent.

Measuring the market by focusing upon shares of slaughter capacity of 1,000 head a day or greater provides a virtually identical picture, as shown on Table 10 below. (See also Attachment 48)

Table 10
Shares of Fed Cattle Slaughter Plants With Reported Capacities Exceeding 1,000 Head A Day
12-State Area
April 1983

Firm	Daily Slaughter Capacity	Capacity Share
	(head per day)	(%)
	(1)	(2)
IBP	24,000	28.8%
Excel	12,650	15.2
Monfort	6,600	7.9
Swift	7,050	8.5
Spencer	6,600	7.9
Total Industry	83,230	100.0%

The proposed Excel/Spencer acquisition would increase the four firm concentration of large-scale slaughter capacity in the 12-state market from 60.4 to 68.3 percent. IBP and Excel together would account for over 50 percent of the industry's efficient slaughter capacity in that area. The slaughter plants included in this tabulation together

have more than enough capacity to slaughter the entire fed cattle supply in the 12-state area.

The effect of the proposed Excel/Spencer acquisition on more narrow procurement markets can be seen by further examining slaughter capacity. As previously discussed, use of a 150-mile standard for identifying procurement areas would not be unreasonable. To recognize all potential buyers who could reasonably be expected to procure fed cattle in the area within which Spencer and Excel plants compete for fed cattle, the slaughter capacity of all buyers in the areas of Nebraska, Iowa, Illinois, Kansas, Missouri, South Dakota and Minnesota shown in Attachment 34 must be tabulated. The relevant slaughter capacity market shares, both as a percent of total capacity or as a percent of plants with daily capacities exceeding 1,000 head are set forth below. (Also Attachment 49.)

Table 11
Fed Cattle Slaughter Capacity and Procurement Market Shares
Seven-State Area
1983

Firm	Total Slaughter Capacity in Market	Market Share	Slaughter Capacity in Plants Over 1,000 Head A Day	Share of Efficient Capacity
	(head/day) (1)	(%) (2)	(head/day) (3)	(%) (4)
IBP	15,500	36.1%	15,500	45.1%
Excel	2,550	5.9	1,750	5.1
Spencer	6,600	15.4	6,600	19.2
Swift	1,750	4.1	1,750	5.1
Monfort	3,800	8.9	3,800	11.1
Total Industry	42,930	100.0%	34,380	100.0%

As Table 11 indicates, in the seven-state area, the four firm buyer concentration ratio is 66.3 percent of all capacity and 80.5 percent of all large-scale slaughter capacity. The proposed acquisition will increase the four firm concentration ratios to 70.4 and 85.6 percent, respectively. If the acquisition is consummated, IBP and Excel/Spencer together will account for 57.4 percent of all buying capacity within a reasonable range of the overlapping procurement area.

The slaughter shares shown on Table 11 are generally consistent with the market shares found in many Excel documents analyzing procurement in the "western corn belt area." IBP is seen as accounting for 40 percent and Spencer for 25 percent of procurement in this area. (Attachment 50.)

VI. THE POTENTIAL COMPETITIVE EFFECTS OF THE PROPOSED EXCEL/SPENCER ACQUISITION

It is my opinion that the proposed Excel/Spencer acquisition creates the potential for significantly lessening competition in both the relevant fabricated beef output market and in the fed steer and heifer procurement market.

As the data presented in the section immediately above shown, the proposed Excel/Spencer acquisition will lead to a significant increase in concentration in the relevant fabricated beef market. The share of large-scale fabrication capacity owned by the four largest firms will increase from 63.9 to 71.5 percent. IBP and Excel/Spencer alone will account for 56 percent of such capacity. The four firm concentration of production by slaughterer-fabricators will increase from 64.4 to 71.3 percent.

The proposed acquisition will remove the third largest firm from the market—a firm that grew from sixth to third largest in the period 1980 to 1982. While the Schuyler plant owned by Spencer currently is shut down, Mr.

Monfort's view, confirmed by Excel and Spencer documents, is that the Oakland and Schuyler plants to be acquired from Spencer are relatively modern integrated fabrication plants that could readily be sold to other slaughterer-fabricators so as to enhance their ability to capture multiplant economies and hence become more significant competitive forces.

In the past, the beef fabrication industry has been characterized by new entry and significant growth as firms employing more efficient large-scale combined slaughter-fabrication facilities displaced encumbents saddled with noncompetitive labor contracts, outmoded physical plant and an inferior beef marketing system. However, the ready expansion of slaughterer-fabricators at the expense of less efficient firms seems likely to level off in the near future. The plants with fabricating capacities equal to or exceeding 1,000 head a day now can fabricate over 75 percent of all fed steers and heifers slaughtered. Total boxed beef penetration is expected to increase only a few percentage points in the near future. Thus, increasingly it will be the case that existing firms can expand or new entrants succeed only if they can wrest market share away from incumbents now operating relatively large-scale fabrication capacity. The proposed Excel/Spencer acquisition will tend to solidify the structure of the market as one dominated by two firms owning over half the industry's economical capacity. All else being equal, as individual firms grow large relative to the total size of the market and as the number of participants decreases, the likelihood of noncompetitive market performance increases.

Whether the beef fabrication industry could persist in performing noncompetitively hinges on the significance of barriers to entry. The chief entry barrier characterizing this industry is the presence of significant economies of scale. As discussed above, important economies of scale persist up to slaughter-fabrication plant sizes of at least 1,500 head per shift. Individual slaughter-fabrication plants

of the sizes now relied upon by all major participants in the industry (400,000 to 1,000,000 head a year) each are capable of producing 2 to 5 percent of the industry's boxed beef output. Beyond this, there would seem to exist clear additional economies associated with multiplant operations. These include: (1) the ability to lower fed cattle input costs by shifting slaughter-fabrication production among plants to take advantage of local fed cattle price variations; (2) the ability to shift production among plants to minimize the impact of disruptions in the supply of fed cattle or localized labor stoppages; (3) the ability to lower procurement costs as a result of information gained from a more extensive fed cattle buyer network; and (4) the ability to lower the cost of transporting boxed beef to end-markets by spreading production points. Indeed, points (1) and (4) are cited by Excel as key reasons for seeking to acquire Spencer. Given this, to have a reasonable prospect for success, a potential entrant would have to consider entering with at least two and perhaps more large scale plants. Val Agri, the most recent entrant bears this out. Val Agri's two slaughter-fabrication plants together are expected to have a capacity of 1.3 million head a year.

As suggested above, the future significance of these scale economies will be enhanced by expected demand and supply conditions in the industry. The demand for boxed beef seems likely to level off. Overall beef consumption is not growing and the proportion of all beef which is boxed is nearing a limit. Beyond this, there now exists enough large-scale fabrication capacity to supply most of the industry's output. Thus, efficient sized new entry is likely to create substantial excess capacity. Also, because fed cattle procurement markets are localized, adding substantial new slaughter capacity to a given area will tend to drive up cattle prices. In short, a new entrant of efficient size cannot help but disturb the water noticeably, both in the boxed beef and fed cattle markets, thus reducing the expected profitability associated with entry. Excel's documents show a clear recognition of the need to avoid

creating new capacity when seeking to enter additional markets (Attachment 51.)

The capital required for effective entry also presents a barrier to entry. Mr. Monfort has informed me that initial construction costs and working capital requirements amount to at least $50 million for a single minimum optimal size slaughter-fabrication plant. Multiplant entry would require proportionately more capital. As its documents reflect, Excel does not anticipate increased competition due in part to the large capital requirements necessary for new plant and equipment. (Attachment 52.)

Finally, the structure of the beef fabrication market as a two firm dominated industry occupied by well-financed encumbents may create an entry barrier if potential entrants belive that the dominant firms can and will significantly affect boxed beef output and fed cattle input prices by resisting loss of market share to new entrants.

Concentration on the buyer side of the fed cattle market also will increase substantially. The consummation of the proposed Excel/Spencer acquisition will raise four firm fed cattle buyer concentration in the 12-state area from 59.0 to 65.2 percent and continue a trend of rapid concentration increases. In the more narrow seven-state area, the four firm concentration will increase to 70.4 percent of all slaughter capacity and to 85.6 percent of large-scale slaughter capacity. IBP and Excel/Spencer will account for close to 60 percent of all buying capacity within a reasonable range of the overlapping procurement area in which the Excel/Spencer acquisition will eliminate one major buyer. The combination of such buyer concentration and barriers to the entry of additional optimal sized slaughterer-fabricators may permit buyers to exercise significant influence over fed cattle prices.

In sum, considering (a) the transition of the industry toward large-scale slaughter-fabrication facilities; (b) the trend toward concentration; and (c) the increased dominance of the industry by two well-financed firms having the incentive to increase their shares of the market, it is my opinion that the proposed acquisition may have the effect of substantially lessening competition in the markets for fabricated beef and fed steer and heifer procurement I have previously discussed.

VERIFICATION

JOE D. PACE, being duly sworn, deposes and says that he has read the foregoing testimony, knows the contents thereof, and that the same are true as stated.

/s/ Joe. D. Pace

Joe D. Pace

[Notary Certificate Omitted in Printing]
[Attachments Omitted As Subject to Protective Order; See Sealed Joint Appendix for Attachments]

Def. Ex. 7J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DECLARATION OF DONALD C. MEIERGERD

I, DONALD C. MEIERGERD, declare and state as follows:

1. I am the Vice President for Pricing of Boxed Beef for Excel Corporation, 2901 North Mead, Wichita, Kansas 67201. I have personal knowledge of the matters contained in this declaration and, if called upon to testify, I could and would competently testify to them.

BACKGROUND

2. I received a Bachelor of Science degree in Animal Science from the University of Nebraska in 1963.

3. I went to work for Wilson Meat Packing Company in Omaha, Nebraska in March, 1964 as a trainee in the Beef Department. While employed by Wilson Meat Packing Company I gained experience in carcass beef selection, carcass grading, boxed beef, boning of carcass beef and sales of both carcass and boxed beef.

4. In October, 1966, I was transferred by Wilson to Kansas City, Kansas, where I was Assistant Beef Manager. I was involved in all facets of the Beef Department, from the buying of live cattle to the shipping, sale and marketing of all beef products.

5. In approximately January, 1969, I was transferred by Wilson to Albert Lea, Minnesota, where I continued my involvement in various facets of the Beef Department, especially sales and marketing.

6. In March, 1969, I was employed by Iowa Beef Packers as Carcass Sales Manager at its slaughter plant in West Point, Nebraska. My responsibilities included all selling, merchandising and shipping of beef carcasses.

7. In October, 1973, I transferred to Missouri Beef Packers ("MBP," and later "MBPXL"), a corporate predecessor of Excel. My responsibilities included selling boxed beef, carcass beef, offal and by-products from Missouri Beef Packers' new plant in Boise, Idaho. I was also responsible for developing the northwest sales marketing area for Missouri Beef Packers products.

8. In May, 1974, MBP closed the Boise, Idaho plant and I was transferred by MBP to Plainview and Friona, Texas on a temporary basis. My primary responsibility there was selling boxed beef nationwide. I reported to Mr. Robert Burns, Vice President for Sales.

9. In March, 1975, I was transferred to MBPXL's corporate headquarters in Wichita, Kansas with the responsibility of selling boxed beef. I reported to Gene Walker, Sales Manager for Boxed Beef.

10. In December, 1980, I became National Sales Manager for MBPXL. I directed boxed beef pricing on a national basis, helped to train sales people, assisted with credit and claims, and handled several large boxed beef accounts. I reported to Don Weber, Vice President for Boxed Beef Sales.

PRESENT POSITION

11. In February, 1983, I became Vice President for Pricing of Boxed Beef for Excel. My responsibilities include selling, pricing and merchandising of boxed beef products. I am also involved in export sales and training

of new employees. I report directly to William Fielding, President of Excel.

PRICING OF BEEF PRODUCTS

12. The pricing of beef products is very complex. It requires a seller to consider numerous factors, to make personal judgments regarding each of these factors, and, once such evaluations have been made, to negotiate with purchasers.

13. The most important factor that we at Excel consider in setting our boxed beef prices is our position with respect to each of the items we sell. This includes our current and anticipated inventory levels, the amount of our current inventory that has been sold and is to be shipped during the next week, and the current and estimated prices for our beef. It is important to keep inventory levels fairly stable. We must have enough beef to meet customer demand, yet we must also avoid having too high an inventory, since beef is quite perishable. We hold a conference call with all of our sales offices at 9:00 every morning and again at 1:00 every afternoon to determine which items are selling well and which items are not selling well in the various areas to which we sell.

14. The second most important factor in setting our prices is our raw material costs—that is, the current price and availability of cattle and our expectations as to the future price and availability of cattle.

15. There are also at least four other factors that we consider in our pricing decisions. First, we consider the position of our competitors—the prices they are quoting and the estimated level of their inventories. Second, we consider the different meats and different types of beef that consumers are buying in supermarkets—for example, whether they are buying more pork or poultry and less beef. Beef competes with pork and poultry. If supermarkets will be featuring beef over the coming weekend, they

will sell more beef and less pork and poultry. Accordingly, we will anticipate their need to purchase more beef after the weekend. If supermarkets are featuring pork and poultry, they will sell more pork and poultry and less beef, and we will anticipate their purchasing less beef after the weekend. Third, we consider seasonal trends. For example, less beef and more turkey is sold during the weeks prior to Thanksgiving; more middle meat (which includes loin and rib cuts) is sold during the weeks before Christmas; more steak and hamburger are sold just before the Fourth of July. Fourth, we consider the amount of sales that we have made for the export market and how much beef should be put in the freezer for export.

16. There is a great deal of judgment involved in evaluating the various factors that affect the price of our beef. We are attuned to the buying patterns of different customers. If certain customers increase their orders for particular items, that may indicate an increased general demand for those items. Conversely, if certain customers decrease their orders for particular items, that may indicate a decreased general demand for those items.

17. The pricing of our boxed beef products is further complicated by the complex configuration of beef products. There are different grades, different yields, different cuts, different sizes. Altogether, we sell about 250 different items. They are each priced separately. For example, there are five different types of choice grade top butts—ten pounds and under, ten to twelve pounds, twelve to fourteen pounds, fourteen and up, and No. 2 (which has a lesser value). Each has a different price per pound.

18. After we consider the relevant variables and decide upon our asking prices for all of our different boxed beef products, we must then negotiate the actual prices with our various purchasers. It is typically not the case that a customer simply accepts our quoted price. Rather, the substantial majority of our sales involve counter-offers from

purchasers and negotiation of a mutually agreeable, and often a compromise, price. Our willingness to lower our quoted prices depends, of course, on the changing variables we originally considered in setting our quoted prices, including, especially, our inventory levels. Several other factors affect the outcome of our negotiations with purchasers, including the date of delivery and the sheer negotiation skills and reputations of the people involved in the negotiations.

SUBSTITUTES FOR BOXED BEEF

19. Excel's boxed beef competes with all beef products and with pork and poultry as well. First, Excel competes not only with other packers but with fabricators who do not slaughter ("breakers"). Boxed beef produced by breakers sells at generally the same prices as packer boxed beef and is interchangeable with packer boxed beef.

20. Excel also competes with fed cattle fabricators who do not box (that is, vacuum pack) all of their primal and subprimal cuts. Non-vacuum packed cuts are substitutes for vacuum packed cuts and sell for roughly the same prices as vacuum packed cuts. If the price of boxed beef were to increase significantly for a substantial amount of time while the price of non-boxed beef remained the same, a number of purchasers would reduce their purchases of boxed beef and increase their purchases of non-boxed beef. Conversely, if the price of non-boxed beef were to increase significantly for a substantial amount of time while the price of boxed beef remained the same, a number of purchasers would reduce their purchases of non-boxed beef and increase their purchases of boxed beef.

21. Several of the larger retailers, including Winn-Dixie Stores, Inc., Kroger Company, Inc., Safeway, and H. E. Butts, have fabrication facilities of their own. Such retailers both purchase boxed beef and purchase carcass beef for fabrication. Carcass beef is a substitute for boxed beef

for such purchasers. Meat fabricated from beef carcasses sells at retail for about the same price as meat from boxed beef. When the price of boxed beef rises, the price of carcass beef normally rises as well and when the price of boxed beef falls, the price of carcass beef normally falls also. Retailers with fabrication facilities can vary the amount of carcass beef and boxed beef that they buy. If the price of boxed beef were to increase significantly for a substantial period of time in comparison to the price of carcass beef, such retailers would reduce their purchases of boxed beef and increase their purchases of carcass beef.

22. In addition, some retail stores purchase the meat of cows and bulls for use in ground beef. Ground beef can be made out of a variety of items, including chuck, 50/50 trimmings, shanks and imported beef, as well as the meat of cows and bulls. When we price our ground beef, which is primarily from the meat of fed cattle, we consider the price of other products that can be made into ground beef. Ground beef competes with primal and subprimal cuts from fed cattle. In pricing our boxed primals and subprimals, we consider the price of ground beef. If the price of cuts from fed cattle were to rise significantly for a substantial time period in comparison to the price of ground beef, consumers who purchase meat products in supermarkets would decrease purchases of cuts from fed cattle and would increase their purchases of ground beef. Therefore, retail stores would in such circumstances decrease their purchases of beef from fed cattle and increase their purchases of ground beef in response to a significant and non-transitory rise in the price of beef from fed cattle.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of October, 1983, at Denver, Colorado.

/s/ DONALD C. MEIERGERD

DONALD C. MEIERGERD

Def. Ex. 7K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DECLARATION OF DAVID J. NEUBAUER

QUALIFICATIONS

1. I have been involved in the meat packing industry for more than forty years. I began to work in family-owned butcher and meat distribution facilities when I was 13 years old. Either alone or in partnership with others, I have bought and sold approximately 15 beef plants. I have done more than 45 appraisals of meat packing plants. A true and correct copy of my resume listing my positions in the industry, the firms I have owned and appraisals I have done is attached hereto as Exhibit A and incorporated by this reference.

2. Between 1965 and 1983, I was a principal and executive vice president of Omeco-Boss (or its predecessor companies) ("Omeco"), which designs and constructs meat packing plants and supplies equipment to those plants. I remained with the company as a senior vice-president until March 1983, although I sold my ownership interest in 1981. During my 18 years with Omeco, I participated in the design, construction or equipment supply of hundreds of meat packing plants. One of my principal responsibilities with Omeco was to estimate the cost and feasibility of constructing new plants and remodeling existing facilities.

3. Since 1970, I have been President of Midwest Animal Products, a beef fabricating plant located in Omaha, Ne-

braska. Midwest Animal Products receives carcass beef from Wilson Foods Company and produces boxed beef according to Wilson's specifications. Midwest Animal Products has been manufacturing boxed beef since January 1, 1979.

POSSIBLE METHODS OF ENTRY

4. New competitors can enter into the slaughter and/or fabrication of cattle in several ways. These include: (1) construction of a new plant; (2) purchase of an existing plant that is in operation; (3) purchase of an existing plant that is not currently in operation; (4) purchase of a small plant and expansion; (5) purchase of a slaughter plant and addition of fabrication; and (6) purchase of a fabrication plant and addition of slaughter.

SCALE OF ENTRY

5. A new firm can enter the market and be successful with a beef slaughter and/or fabricating plant with a minimum capacity of approximately 1,200 head of cattle per day. Allowing for some work stoppages, such a plant would process about 165 head per hour during a work day of 7-$^1/_2$ to $7^3/_4$ hours. A typical plant of this size would operate between 250 and 280 days per year and have about 384 employees. This would include 225 in fabrication, 100 in slaughter, 20 in maintenance, 5 in inedible rendering, 1 in edible rendering, 8 in a hide house, 10 in management and administration, and 15 foremen.

6. An entrant at the 1,200 head per day scale will be able to compile a sufficient amount of fabricated products to make full truckload shipments of 40,000 pounds on a regular basis. For example, if a plant fabricates only 500 head per day, it may take four to five days to accumulate 40,000 pounds of each type of product. At 1,200 head per day, a plant can produce a truckload in approximately two days—an acceptable period. In addition, a 1,200 head per

day plant permits specialization of workers. In smaller plants, time is sometimes lost when workers are forced to change functions. Also, some employee costs remain roughly the same for a small (or large) plant. For example, a good superintendent or chief engineer will earn about $30,000, regardless of plant size. Finally, a firm operating with a capacity of approximately 1,200 head per day can reasonably expect to sell to a wide variety of customers, including hotels, restaurants and institutions, and to supermarket chains.

7. At Midwest Animal Products's beef fabricating plant in Omaha, Nebraska, we process about 1,000 to 1,200 head per day and operate about 250 to 280 days per year. The following companies slaughter in the range of 1,200 head per day: Pepper Packing Company in Denver, Colorado; Tama Meat Packing in Tama, Iowa; Dubuque Packing in Omaha; Litvak Packing in Denver; Kenosha Beef Packers in Illinois. In recent years, Omeco has designed a number of beef packing plants that process about 1,200 head per day.

RELATIVE ADVANTAGES OF FIRMS OF DIFFERENT SIZE

8. Plants and firms handling more than 1,200 head per day have some advantages over a single 1,200 head per day plant. A larger plant will have somewhat lower costs than the 1,200 head per day facility. This cost advantage may, in some circumstances, be offset by the increased cost of purchasing live cattle either locally because of increased demand or by the requirement that the firm go farther from its plant to acquire live cattle and thus incur higher transportation costs. Large firms generally benefit by being able to make large sales to large purchasers. Large, multi-plant concerns, selling to large firms are generally committed to producing the same, uniform product at each of its plants, and large buyers want the same product in successive purchases. This means that the firm

may be committed to slaughtering and/or fabricating only particular yield grade or weight or to certain specifications. Relatively smaller firms have greater flexibility in purchasing a wider variety of cattle, both fed and nonfed, and thereby can take advantage of favorable cattle prices for any variety. There is generally less bureaucracy and lower overhead. Decisions can be made rapidly. In a volatile industry, like beef packing, where market changes occur frequently and quickly, this can be quite important. In my opinion, Hyplains Beef in Dodge City, Kansas, illustrates the ability of a small firm to operate successfully. Its good management actively takes advantage of changing market conditions and operates a slaughter plant (capacity about 1,400 head per day) in the shadow of the nearby large Excel Dodge City and IBP Finney County plants. Small firms are not at a disadvantage in collecting market information concerning cattle prices. Detailed daily USDA information on cattle prices in different locations is available equally to large and small cattle buyers and cattle sellers.

9. Small slaughter and/or fabrication plants with capacity less than 1,200 head per day are not necessarily doomed to fail. Many have the option of expanding their facilities. Others succeed by taking advantage of special situations in the marketplace. Some take advantage of favorable local labor market conditions. Others may have special access to cattle supplies in the terminal markets, for example, which larger purchasers may not want because of their preference for specific yield grades and cattle varieties.

DE NOVO ENTRY

1. Construction of a New Facility.

10. Construction of a new plant is the most expensive and slowest means of entry. Still, to construct a new 1,200 head per day slaughtering and fabricating plant would require an initial investment of only approximately $20 million and would probably take only between 12 and 18 months. To construct a new 1,200 head per day fabricating plant would cost $9–$10 million. Similarly, to construct a new 1,200 head per day slaughtering plant would cost $9–$10 million.

11. The plants described above would have all necessary facilities to operate as fully functioning independent firms. The $20 million combined slaughter and fabricating plant, for example, would have cattle receiving pens, kill floor, chill coolers, full fabricating capacity for all slaughtered cattle, box storage for the boxed beef, a computerized inventory control system, edible and inedible rendering facilities, an employee locker room, and management offices. In practice, some firms are able to fashion their operations so that they do not need each and every one of these facilities. The new fabricating plant being constructed in Omaha by Nebraska Boxed Beef, for example, will operate without box storage. My firm, Midwest Animal Products, is a custom packer for Wilson. We have no cattle procurement responsibilities, nor do we market the boxed beef. This is not a unique situation. For example, B.C. Packing, in Omaha, slaughters and fabricates as a custom packer for Armour.

12. Nebraska Boxed Beef is currently building a fabricating plant in Omaha, Nebraska at a cost of about $9–$10 million. It will have a capacity of approximately 1,500 head per day. I recently appraised the Pepper Packing beef slaughter plant in Denver, Colorado, which has a capacity of about 1,200 head per day, to have a replacement cost of $9.1 million.

13. Purchase of an existing plant is much less costly. For example, initial investment in Midwest Animal Products' plant in Omaha was about $3 million. The building, without fabrication capacity, was purchased for approximately $150,000. It took five months to install the fabrication equipment.

(a) Start-Up.

14. A new slaughter and/or fabricating plant can be planned and constructed in as little as twelve to fifteen months. In addition to construction costs, start-up costs could be about $500,000 for a slaughter or fabrication facility and $1 million for an integrated facility. Midwest Animal Products began operation in January 1979. To install the fabricating plant in a building the firm already owned took five months. General planning and contract negotiations with Wilson Foods had taken place over the preceding seven months. In planning the start-up, the firm budgeted $400,000 in initial losses. In fact, losses were only $375,000 and the firm was operating at a profit after five months. Beginning production as a custom packer for Wilson meant that we had no difficulty securing customers for our product. Wilson performed the marketing function.

(b) Working Capital.

15. Federal law requires payment for live cattle within 24 hours of purchase. A new entrant into the beef market must have working capital to finance its operations from the time it purchases its beef until it receives payment for its slaughtered cattle. For a slaughter-only firm, this initial time lag is about 12 to 14 days. For a 1,200 head/day plant purchasing cattle at $700 each, this amounts to a working capital requirement of approximately $10–12 million. A fabrication-only firm beginning operations must anticipate a similar time lag, but need not pay its suppliers immediately (purchases of carcasses are not subject to the requirement of payment within 24 hours). It, thus, must finance its operations for approximately 7 days. For a 1,200 head/day plant purchasing cattle at $700 each, this amounts to a working capital requirement of approximately $6 million. A combined slaughter/fabrication plant should anticipate a 19-to 21-day period before its receivables are paid. For a 1,200 head/day plant purchasing cattle at $700 each, this amounts to a working capital requirement of about $6 million.

16. Once a slaughter and/or fabrication plant is built, it is not difficult for the owner to obtain working capital from a lender, as long as the owner has substantial equity in the plant.

2. Purchase and Expansion of an Existing Facility.

17. To construct a new facility is the most expensive and slowest method of entry. In most instances, a new entrant can purchase an existing facility more cheaply and quickly than construct a new plant. A recent example of a new entrant which has chosen this course is Val-Agri. Val-Agri, a new firm largely comprised of former Excel executives, announced its entry into the market in March of this year. It purchased two closed slaughter and fabrication plants, one from Farmland Foods located in Garden City, Kansas for about $2.5 million, and one from John Morrell & Company located in Amarillo, Texas for about $4 million. Val-Agri currently is slaughtering and fabricating cattle and plans, with an investment estimated at $18 million, to be processing 5,000 head per day within a year.

3. Likely Potential Entrants.

18. There are a large number of likely potential entrants that could and would take advantage of the easy entry conditions in response to a significant nontransitory increase in boxed beef margins. Thus, the large-scale fed cattle sellers—whether feedlot operators (like Monfort originally) or cooperatives of feeders (like Land O'Lakes)—would detect any artificially depressed prices they were receiving for fed cattle and be able to respond by rapid forward integration into slaughter. Monfort's own history of forward integration from its feedlot operations confirms the ability of cattle feeders to enter as viable slaughterers and fabricators. Similarly, Sterling Colorado Beef Company was formed by feeders who integrated into slaughter.

19. Some large retail stores, such as Winn-Dixie and Kroger, now have substantial internal fabricating facilities. Other retail chains, which in the past have had such facilities, could begin operating again. A&P, for example, has an empty fabrication plant that could operate in less than a year. Moreover, other firms and persons knowledgeable in the beef industry, for example, Joseph Amora (former President of Circle C Beef and one of the investors in Nebraska Boxed Beef), the former Excel executives who formed Val-Agri and my other principals and myself at Midwestern Animal Products, can and have entered in response to what were perceived to be favorable market conditions.

20. Firms that currently slaughter and/or fabricate cows and bulls as well as fed cattle would increase their fed cattle production in response to a significant nontransitory increase in the price of grain fed boxed beef or decrease in the price of fed cattle. A properly designed plant can handle a wide variety of types of beef, including fed steers and heifers of all grades and yields, fed and non-fed Holsteins, cows and bulls of all grades and yields at roughly equivalent costs. For example, my own Company, Midwest Animal Products, fabricates many grain-fed Holstein cows in addition to fed steers and heifers at its Omaha plant. A number of other plants that slaughter and/or fabricate fed steers and heifers also process fed Holsteins. In addition, some plants that process fed cattle also process cows and bulls as part of their everyday operation. For instance, some fabricating plants process both fed steers and heifers and cows by alternating a boning or cattle packing operation on cows with a straight fabricating operation on grain-fed steers and heifers.

21. Some plants, such as the Sterling Beef plant at Fort Morgan, Colorado, perform all fabricating operations for a single carcass on the same fabrication table rather than routing different parts of the carcass to different tables. The new Nebraska boxed beef plant beginning construction

this week in Omaha will have this capacity. At such a plant, it would be possible to run yield grade 3 steers and heifers on one table, yield grade 4 on a second table, and cows on yet a third table. Such firms can convert relatively easily from processing fed cattle to cows and vice versa.

22. In addition, with the exception of some plants that do on-rail boning, many plants that currently slaughter and/or fabricate cows and bulls, such as Northern States Dressed Beef in Omaha, could convert to processing fed cattle if the price of fed boxed beef rose, or the price of grain fed cattle dropped, significantly. Many such firms now fabricate some primal and subprimal cuts and could readily convert to fabricating primal and subprimal cuts from fed cattle. The kill floors of cow slaughterers are almost identical to the kill floors of fed cattle slaughterers. Even the rail heights are the same. The cuts are different, but employees working in a cow and bull plant are skilled with knives and could easily learn the cuts needed to fabricate fed cattle. Some cow fabricators already vacuum pack part of their beef. A switch from fabrication of cows to fabrication of fed cattle might mean that the fabricator would require additional vacuum packaging equipment. Many plants are designed so as to anticipate that requirement, however. Moreover, vacuum packaging equipment and all related equipment is easily obtainable at a cost of about $750,000 for a 1,200 head per day plant. For a plant that currently slaughters and fabricates 1,200 head of cows and bulls per day to convert completely to slaughtering and fabricating 1,200 head of fed cattle per day would require an investment of between $2 and $4 million dollars. A packer slaughtering and fabricating cows and bulls could convert immediately to slaughtering and fabricating some fed cattle. To convert from slaughtering and fabricating only cows and bulls to slaughtering and fabricating only fed cattle would take about six months.

23. To switch from slaughtering cows and bulls to fed cattle might require refocusing a firm's marketing efforts.

Slaughterers of cows and bulls frequently have relatively larger sales to manufacturers of processed meat products and relatively smaller sales to the typical purchasers of fed cattle—supermarket chains and the hotel/restaurant/institution trade. By retaining a salesperson experienced in selling cuts from fed cattle, the balance of the existing sales force could market the beef from fed cattle.

EXPANSION BY EXISTING FIRMS

24. Some firms can increase output by increasing the number of hours worked per day or operating on Saturday and Sunday. The capacity of a beef slaughter and/or fabrication operation can be expanded by adding a second shift or by increasing single shift capacity. A firm currently operating a slaughter/fabrication facility at one shift per day, and wishing to expand capacity, would first and most cheaply add a second shift. For example, Excel's Dodge City plant operates two shifts per day and thereby processes 4,000 rather than 2,000 head of cattle each day.

25. In adding a second shift to a plant, it may be necessary to increase the hanging cooler capacity, box storage capacity, and install additional lockers for employees. Historically, kill rates have increased. Plants are, therefore, usually designed for easy expansion. If expansion were not anticipated, it would cost about $2.2 million to add a shift to a single-shift 1,200-head per day slaughter and fabrication plant. This would include $1.5 million for doubling the box storage, $625,000 for doubling the hanging coolers, and $40,000 for adding additional lockers for employees. The existing rendering capacity would probably be adequate. If the rendering equipment did require expansion, this would amount to, at most, an additional $300,000.

26. Capacity can also be expanded by increasing single shift capacity. Omeco has redesigned a number of packing plants in recent years to increase their capacity. This may involve redesigning the rendering, refrigeration and storage facilities. Omeco's policy, when it designs a new plant, is to allow room for expansion in capacity at a later date. To double the per-shift capacity of a 1,200 head per day plant would cost approximately 75% of the original cost, depending on how much room for expansion was designed into the original building. Thus, a $20 million combined slaughter/fabricating plant could double its per shifts capacity for about $15 million.

27. Generally, expanding an existing plant will take less time than building a completely new facility. The start-up time is also generally shorter with an expanded plant. A shut down plant should be operating efficiently after about five or six months. Monfort's acquisition and expansion of the Grand Island, Nebraska plant is a good example of a plant brought on stream very quickly. (I participated in the design of the plant.) Monfort bought the slaughter-only Grand Island facility from Swift & Co. in July 1979. Within a little more than a year, Monfort had increased the slaughter capacity from about 700 head per day to about 2,200 head per day by expanding the kill floor and adding cooler capacity, and has added a completely new fabricating operation to the plant at a cost of approximately $8 million.

28. In addition to Monfort, several other competitors have recently purchased existing plants and expanded them. Sterling Colorado Beef acquired a slaughter plant at Fort Morgan, Colorado about three years ago and has installed a 2,000 head per day fabrication operation. Similarly, Cornland Dressed Beef has installed fabrication equipment at its Lexington, Nebraska slaughter plant. Sterling Colorado Beef has also expanded its Sterling, Colorado plant from 125 to 240 head per hour. SIPCO (Swift) recently purchased and expanded an integrated plant at Hereford, Texas and also expanded its Des Moines, Iowa plant.

AVAILABILITY OF TECHNOLOGY AND KNOW-HOW

29. A new entrant into the beef industry can acquire the appropriate equipment and technology with little difficulty. Certain vacuum packing equipment is patented, but even that is available to all purchasers on equal terms. No technology involved in the beef industry cannot be readily purchased.

30. Similarly, one can easily hire designer/contractors, such as Omeco-Boss, with the expertise to design and build plants. Omeco-Boss will even contract to construct a "turn-key" plant—one which they design, construct, and equip with the new entrant having only to "turn-key." Monfort itself provides such design services. Monfort's design and construction unit, headed by Dean Davis, is currently assisting Val-Agri with the expansion of its Amarillo plant and worked on the expansion of National Beef's Liberal, Kansas plant. Mr. Davis and his group have a reputation for being able to plan and to finish beef slaughter and fabrication projects very quickly. Moreover, employees with the expertise to run the plants are available. Employees frequently move among employers in this industry. This is illustrated by the recent departure from Excel of five of its executives, including its president, to form a new firm, Val-Agri. As shown by the experience of Monfort, Val-Agri, and other entrants, personnel is available at a reasonable cost to operate new or expanded facilities. In fact, labor costs have dramatically declined in the last few years, giving new entrants a distinct advantage over existing participants with unfavorable union contracts.

31. There is a market for used beef slaughter and fabricating equipment. Used equipment sells at a substantial discount compared to new equipment. When slaughter plants are closed down, much of the equipment is sold and

ultimately used by other beef slaughterers or fabricators. I have bought and sold used fabrication and slaughter equipment often in the process of buying and selling beef plants.

EXAMPLES OF RECENT ENTRY

32. Recently, a number of firms have entered the market for the first time, and a number of others have substantially expanded their capacity. One of the most important new entrants is Val-Agri. In March of this year, Val-Agri announced its entry into the meat processing market. Val-Agri's financier, Mr. Ed Cox, purchased a meat packing plant in Garden City, Kansas in 1982 from Farmland Foods for about $2.5 million. In December 1982 he acquired a second plant in Amarillo, Texas from John Morrell & Company for about $4 million. Val-Agri plans to double production rates at both plants by adding second shifts and installing additional coolers and storage facilities at a cost of about $18 million. Within a year, Val-Agri is expected to process 5,000 head of cattle per day.

33. Kane-Miller purchased an integrated plant from American Beef in the mid-1970s. Similarly, Circle C entered the industry in 1976 with a 1,500 head per day fabricating operation and Pepper Tree Beef Company entered in about 1976 with a fabrication operation of about 800 head per day. Midwest Quality Beef opened a fabrication plant in Chicago in late 1978. My own company, Midwest Animal Products, opened its fabrication plant in 1979. Con-Agra has recently purchased a slaughter and fabrication plant from Armour in Nampa, Idaho. Nebraska Boxed Beef, a newly-formed investor group, plans to start construction this week on a fabrication plant in Omaha, Nebraska and to begin its operation by April 1984. The plant will fabricate about 1,500 head per day.

33. In addition to this *de novo* entry, many firms, including Monfort at its Grand Island facility and SIPCO

(Swift) in Des Moines, Iowa and Hereford, Texas, have significantly expanded their slaughter and/or fabrication operations, as discussed above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of October, 1983 at Denver, Colorado.

/s/David J. Neubauer
David J. Neubauer

EXHIBIT A

MAPS
MIDWEST ANIMAL PRODUCTS, INC.

April, 1983 EXHIBIT A

NAME:	David J. Neubauer
PERSONAL DATA:	Age—60 Married—Four Children
MILITARY:	U. S. Navy—1942-1946
EDUCATION:	Bachelor of Science, Electrical Engineering University of Wisconsin

EXPERIENCE:

Dates	Position	Company	Description
1970 to present	President and Director	Midwest Animal Products Omaha, NE	135 head/hour beef fabricating plant
1980 to present	Vice President and Director	Pella Processing, Inc. Omaha, NE	Meat recovery plant
1981 to present	Partner	Mo-Val Associates Omaha, NE	Former Great Plains Beef Co. Plant in Council Bluffs, Iowa
1976 to present	Partner	KEM Associates Omaha, NE	Buying/selling meat packing plant and equipment

EXHIBIT A CON'T

Dates	Position	Company	Description
1983 to present	Partner	Arval Associates Omaha, NE	Former ALPHA BETA Packing Co. Plant in Pueblo, Colorado
1955 to present	President and Director	Platte Valley Rendering Sterling, Colorado	Rendering and pet food plant
1981 to 1983	Sr. Vice President (Retired)	Omeco-Boss Co. Omaha, NE	Consultants, designers and manufacturers for Meat packing and material handling industry
1970 to 1977	President and Director	Midwest Edible Oil Co. Waterloo, NE	Lard rendering plant
1965 to 1981	Executive Vice President and [sic]	Omeco-St. John Co. Omaha, NE	Predecessor of Omeco-Boss Co.
1954 to 1965	Chief Engineer	Needham Packing Co. Sioux City, IA	Multi-plant beef Slaughtering
1952 to 1956	President and Director	Sidney Beef Co. Sidney, NE	20 head/hour beef slaughtering plant
1946 to 1976	President and Director	Sterling Packing Co. Sterling, CO	Regional beef, pork and sausage processor

APPRAISALS BY DAVID J. NEUBAUER
1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
American Beef Packers Omaha, Nebraska	American Beef Packers Council Bluffs, Iowa	240/hr beef kill	Tax valuation in District Court
Pierce Packing Company Billings, Montana	Pierce Packing Co. Billings, Montana	500/hr hog kill, cut, smoked meats & sausage manufacturer, 40/hr beef kill and fab	Financing & valuation for acquisition 1 appraisal—1974 1 appraisal—1977
Green Giant Minneapolis, Minn	Bama Meats Florence, Alabama	60/hr beef, 200/hr hog kill smoked meat & sausage mfg	Valuation for sale of equipment
Union Bank Wichita, Kansas	Aristo Foods Holton, Kansas	60/hr beef kill	Valuation for Bankruptcy Court and District Court
John Morrell & Company Chicago, Illinois	West Texas Dressed Beef Amarillo, Texas	125/hr beef kill	Valuation in Bankruptcy Court
Iowa Beef Processors Dakota City, Nebr.	Madison Foods Madison, Nebraska	600/hr hog kill & cut	Valuation for acquisition & taxes
American Beef Packers L. Morgan, Colorado	American Beef Packers Omaha, Nebraska	180/hr beef kill & fab	Valuation for sale
First National Bank Sweetwater, Texas	Pace Packing Company Sweetwater, Texas	30/hr beef kill; 125/hr hog kill; sausage & smoked meat; beef fab	Financing
McCook Packing Company McCook, Nebraska	McCook Packing Co. McCook, Nebraska	20/hr beef kill, boning & fab	Valuation for acquisition

1974 to September cont

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
Nebraska Rendering Co. McCook, Nebraska	Nebraska Rendering Co. McCook, Nebraska	10 cooker rendering plant	Valuation for acquisition
Carl Moris Sublette, Kansas	Anibipro Sublette, Kansas	2 cooker rendering and pet food plant	Valuation for acquisition
Iowa Beef Processors Dakota City, Nebr.	Iowa Beef Processors LeMars, Iowa	60/hr beef kill	Fair market valuation
Iowa Beef Processors Dakota City, Nebr.	Iowa Beef Processors Mason City, Iowa	60/hr beef kill	U.S. District Court
Iowa Beef Processors Dakota City, Nebr.	Iowa Beef Processors Ft. Dodge, Iowa	60/hr beef kill	IBP vs Amalgamated
Buffalo Lake Meat Indus Buffalo Lake, Minn.	Buffalo Lake Meat Co. Buffalo Lake, Minn	60/hr hog kill and cut	Equipment valuation for FHA loan
Marrow, Bland & Rehmet Houston, Texas	Maverick Beef Packers Eagle Pass, Texas	60/hr beef kill & boning	Equipment valuation for financing
Long Prairie Packing Co. Long Prairie, Minn	Long Prairie Packing Co. Long Prairie, Minnesota	40/hr beef kill & boning	Valuation for FHA loan
Mullen Packing Company Mullen, Nebraska	Mullen Packing Co. Mullen, Nebraska	20/hr beef kill	Valuation for Financing
Sterling Colorado Beef Sterling, Colorado	Sterling Colorado Beef Sterling, Colorado	240/hour beef kill	Valuation for merger
Morgan Colorado Beef Co. Ft. Morgan, Colorado	Morgan Colorado Beef Co. Ft. Morgan, Colo.	192/hour beef kill	Valuation for merger

1974 to September 1983

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
Circle C Beef Company Denver, Colo.	Sterling Colo. Beef Co. Sterling, Colo.	125/hour beef fabricating	Valuation for merger
Processors, Inc. Denver, Colo.	Morgan Colo. Beef Co. Ft. Morgan, Colo.	3,000/day hide processing	Valuation for merger
Dove & Company Omaha, Nebr.	Greater Omaha Packing Co. Omaha, Nebr.	40/hour beef kill	Valuation for municipal court

APPRAISALS BY DAVID J. NEUBAUER

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
HEAD OF THE TIDE CORP. Newport, R.I.	ALCO PACKING CO. Champlain, N.Y.	40/hr. Beef Kill, Fabrication	Valuation for Acquisition
HEAD OF THE TIDE CORP Newport, R.I.	ALCO PACKING CO. Winslow, Maine	25/hr. Beef Kill, Fabrication	Valuation for Acquisition
HEAD OF THE TIDE CORP. Newport, R.I.	ALCO PACKING CO. Bangor, Maine	20/hr. Beef Fab. and Cold Storage	Valuation for Acquisition
DAN MIDDAUGH Grand Island, NE	RUDY'S RENDERING CO. Grand Island, NE	4-Cooker Inedible Rendering Plant	Valuation for Acquisition
IOWA BEEF PROCESSORS, INC. Dakota City, Iowa	IOWA BEEF PROCESSORS, INC. Pasco, Washington	240/Hr Beef Kill and Fabrication, Edible and Inedible Rendering	Valuation for State of Washington Tax Board
KRETSCHMAR BRANDS, INC. St. Louis, MO	KRETSCHMAR BRANDS, INC. St. Louis, MO	Ham Processing	Valuation for financing
KRETSCHMAR BRANDS, INC. St. Louis, MO	KRETSCHMAR BRANDS, INC. Hall & Dillon Div Pittsburgh, Kansas	Ham Processing	Valuation for financing
KRETSCHMAR BRANDS, INC. St. Louis, MO	KRETSCHMAR BRANDS, INC. Concordia, Missouri	Ham and Bacon Processing	Valuation for financing

APPRAISALS BY DAVID J. NEUBAUER

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
IOWA BEEF PROCESSORS, INC. Dakota City, NE	IOWA BEEF PROCESSORS, INC. (former Hygrade plant) Storm Lake, Iowa	720/hr. Hog Kill and Cut Edible and Inedible Rendering	Valuation for cost allocation "Equipment Only"
IOWA BEEF PROCESSORS, INC. Dakota City, NE	IOWA BEEF PROCESSORS, INC. (former Dubuque plant) Joslin, Illinois	240/hr. Beef Kill 100/hr. Beef Fabrication Edible and Inedible Rendering	Valuation for cost allocation "Equipment Only"
EOKUK COUNTY State Bank	RAWHIDE RANCH Bavarian Meat, Inc. Sigourney, Iowa	Bacon Processing	Valuation for liquidation "Building Only"

APPRAISALS BY DAVID J. NEUBAUER

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
City of Dubuque Dubuque, Iowa	Dubuque Packing Company Dubuque, Iowa	300/hr. Hog Kill and Cut 100/hr. Beef Kill Sausage, canned meat, smoked meat Edible & Inedible Rendering	Valuation for HUD Grant
City of Dubuque Dubuque, Iowa	Dubuque Packing Company Rochelle, Illinois	350/hr. Hog Kill & Cut Smoked meat, Edible & Inedible Rendering	Valuation for HUD Grant
City of Dubuque Dubuque, Iowa	Dubuque Packing Company Milwaukee, Wisconsin	Market Branch House with Beef fab. boning portion control	Valuation for HUD Grant
Goehring Meat, Inc. Lodi, California	Victor Iowa Pack, Inc. Council Bluffs, Iowa	650/hr. Hog Cut & Kill Smoked meat, Edible & Inedible Rendering	Valuation for Financing
Goehring Meat, Inc. Lodi, California	Goehring Meat Products, Inc., Modesto, Calif.	220/hr Hog Kill	Valuation for Financing
Goehring Meat, Inc. Lodi, California	Western Iowa Pork Company Harlan, Iowa	540/hr. Hog Kill Inedible Rendering	Valuation for Financing

APPRAISALS BY DAVID J. NEUBAUER

1974 to September, 1983

CLIENT	SUBJECT FACILITY	TYPE OF FACILITY	PURPOSE OF APPRAISAL
Goehring Meat, Inc. Lodi, California	Goehring Meat, Inc. Lodi, California	180/hr. Hog Cut Sausage, smoked meat Edible Rendering	Valuation for Financing
Amalgamated Food, Inc. Los Angeles, California	Colorado Packing Company La Junta, Colorado	300/hr. Hog Cut	Valuation for Bankruptcy Court "Equipment Only"
Pepper Packing Company Denver, Colorado	Pepper Packing Company Denver, Colorado	150/hr. Beef Kill	Valuation for Merger
Peppertree Beef Company Denver, Colorado	Peppertree Beef Company Denver, Colorado	100/hr. Beef Fabrication	Valuation for Merger
Pepcol Manufacturing Co. Denver, Colorado	Pepcol Manufacturing Co. Denver, Colorado	10,000 pds/hr Blood 20,000 pds/hr Gelatin bone 30,000 pds/hr Continuous Rendering 15,000 pds/hr Edible Rendering	Valuation for Merger

List of plants purchased by Omeco-St. John Company when David J. Neubauer was Executive Vice President, or by Partnership when he was a General Partner, for the purpose of resale and/or liquidation.

DATE ACQUIRED	FORMER OWNER	LOCATION	TYPE OF FACILITY	APPROX. SQ. FT.
1974	John Morrel & Company	Ottumwa, Iowa	700/hour hog kill and cut, 125/hr beef kill, complete processing including sausage and cannery, edible and inedible rendering.	2,000,000
1976	Metro Meat Company	S. St. Paul, Minn.	300/hr hog kill and cut, edible rendering	47,000
1977	Wilson & Company	Omaha, Nebr.	600/hr hog kill and cut, 125/hr beef kill, 400/hr lamb kill, complete processing, sausage and canning, edible and inedible rendering	450,000
1978	American Beef Company	Omaha, Nebr.	125/hr beef kill, 50/hr beef fab, edible and inedible rendering	88,000
1980	Midwest Edible Oil Co.	Waterloo, Nebr.	Edible rendering	26,000
1980	Omaha Porkers	Omaha, Nebr.	125/hr hog kill and cut	23,000
1980	Packerland Packing Co.	Pampa, Texas	125/hr beef kill, 50/hr beef fab, inedible rendering	82,000
1980	George A. Hormel Co.	Mitchell, S.D.	250/hr hog kill and cut, edible and inedible rendering	36,000

List of plants purchased by Omeco-St. John Company when David J. Neubauer was Executive Vice President, or by Partnership when he was a General Partner, for the purpose of resale and/or liquidation.

DATE ACQUIRED	FORMER OWNER	LOCATION	TYPE OF FACILITY	APPROX. SQ. FT.
1981	Great Plains Beef Company	Council Bluffs, Iowa	240/hr Beef kill, 150/hr beef fab. edible and inedible rendering.	215,000
1981	Glover Packing Company	Roswell, New Mexico	60/hr beef kill, 40/hr beef fab, sausage, inedible rendering	192,000
1983	Alpha Beta Packing Company	Pueblo, Colorado	110/hr Beef kill, 60/hr beef fab, ground beef, edible and inedible rendering	175,000

Def. Ex. 7L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DECLARATION OF DR. THOMAS T. STOUT

I, Dr. Thomas T. Stout declare and say:

BACKGROUND AND QUALIFICATIONS

1. I am a Professor of Agricultural Economics at The Ohio State University, a position that I have held since 1966. In that position, I have teaching as well as research responsibilities. My educational and employment background is set forth fully in my resume, attached hereto as Exhibit A.

2. I received my B.Sc. degree in Agronomy in 1952, my M.Sc. degree in Agricultural Economics in 1953, and my Ph.D. in Agricultural Economics in 1956, all from The Ohio State University. I was an assistant instructor at the university from 1954-56. I am a member of the American Agricultural Economics Association, Sigma Xi national science honorary, and Gamma Sigma Delta national agricultural honorary.

3. During 1957 I was a postdoctoral fellow performing research in Agricultural Economics at Purdue University. From 1958 until 1961 I was an Assistant Professor of Agricultural Economics at Purdue. In 1961, I became an Associate Professor of Agricultural Economics at The Ohio State University, a position that I held until I was appointed a full professor in 1966.

4. During 1969, I took a leave of absence from The Ohio State University to serve, first, as a senior staff economist on the President's Council of Economic Advisors, and later as an agricultural economist in the Economic Research Service of the U.S. Department of Agriculture.

5. During 1976, I was a visiting professor at the University of Alberta, Edmonton, where I taught courses in Introductory Marketing and Agri-Industrial Organization in the Department of Rural Economy.

6. My teaching responsibilities are focused in agricultural marketing and policy. I have taught undergraduate and graduate classes on subjects such as Introductory Agricultural Marketing, Livestock Marketing, Agri-Industry Organization and Public Policy, and Research Methods. As a professor, I also direct and supervise the research of graduate students in agricultural economics. Over the past 20 years, I have overseen directly the work of approximately 20 masters and 10 doctoral candidates, and assisted in the supervision of dozens more, on topics in agricultural economics, principally in the areas of livestock and meat marketing.

7. I have authored and co-authored articles, papers, chapters, and one book concerning livestock marketing and the relationship between economic factors and the structure of the livestock industry. A selected list of my publications relating to the livestock industry is included in my resume, which is attached as Exhibit A.

8. I have been retained by the defendants Cargill, Inc. and Excel Corporation to analyze the relevant geographic and product markets, particularly with respect to factors that affect the demand for the relevant product. My judgments and conclusions as set forth in the remainder of this declaration are based upon my review and analysis of books, articles, papers and other publications on the economics of the livestock industry, several consultations with colleagues, and upon my own education, experience and

research in this field. Based upon these sources, I believe the following statements to be true.

GEOGRAPHIC MARKET FOR THE PROCUREMENT OF FED CATTLE

9. The relevant area of the country for analyzing a merger or acquisition is the geographic area that encompasses those buyers and sellers that may significantly affect the supply and demand for the product at issue. Thus, on the supply side, the relevant geographic market must encompass every seller who, given a price increase by any other seller, would be willing and able to sell to the latter's customers by offering the same or a lower price. Similarly, on the demand side, the relevant geographic market must encompass every buyer who, as a result of a price decrease by a seller, would be willing and able to buy from that seller. Any geographic area that does not encompass all of these sellers and buyers would be too narrow for the purposes of evaluating the effects of a merger or acquisition.

10. It is my judgment that the relevant geographic market in which Excel Corporation's pending acquisition of the Spencer Beef Division of Land O'Lakes, Inc. should be analyzed is the continental United States. Moreover, I have concluded that the prices paid for fed cattle across the country are highly interdependent; as a result, no buyer or seller of fed cattle can, acting independently, influence the market price of fed cattle for more than a very temporary period of time.

11. While a businessman may view the local geographic area in which he makes most of his sales as his "market," an economist does not view this area as the relevant one in which to evaluate the competitive effects of a merger or acquisition. As noted above, the relevant geographic area for merger and acquisition analysis must encompass

all buyers and sellers that may influence the price of the product.

12. Every businessman knows that even if the vast majority of his sales are made in a small geographic area, there are buyers outside of that area who will purchase his product if the total delivered price (*i.e.*, the price of the product plus transportation expenses) is less than the total delivered price they are paying currently. Similarly, such businessmen know that if they raise the price of their product, sellers located outside of their local trading areas will be willing and able to sell to their current customers at a lower total delivered price. Thus, these buyers and sellers, even though they may never make a purchase or sale in a given local trading area have a significant effect on the price in that area.

13. As a result, economists do not regard the fact that most sales of a product are made in local trading areas as proof that the relevant geographic market for that product is local in scope. To the contrary, the existence of such localized sales may be strong evidence that the market is national in scope. If, for example, there are many buyers and sellers of a given product spread throughout the United States, economic theory would predict that the price of that product would tend to be equal in all parts of the country. Any sustained divergences in price will reflect only the incremental cost of transporting the product to a given location.

14. Under such conditions, which economists term a "competitive spatial equilibrium," sales will tend to occur locally as each buyer seeks to pay the lowest total delivered price. Nevertheless, if a seller raises its price, some of its buyers will find it economically advantageous to shift their purchases to another, though more distant, seller; if the magnitude of the price increase is great enough, all of his buyers will shift their purchases to other sellers. In order to avoid substantial financial losses, the seller, in

turn, will be forced to lower his price to the original, competitive level.

15. Since the same analysis may be applied to any given local trading area, there is no logical place to draw a geographic boundary line when buyers and sellers are spread throughout the country. Wherever such a line is drawn, there will be buyers and sellers just beyond it that will be willing and able to transact in the so-defined "geographic market" if the price within that area rises. Thus, the fact that most sales of a product occur in relatively localized areas is perfectly consistent with the existence of a national market.

16. In my judgment, the market for the procurement of fed cattle is a national market and approximates the competitive spatial equilibrium described above. Fed cattle, it must be emphasized, are merely an intermediate product in a production chain that begins with feeder cattle and ends with beef. As a result, the demand for fed cattle, and hence its price, is derived from the demand for beef.

17. Both the feeder cattle market and the beef market are national in scope. As a result of the development of new hybrid varieties of grain sorghum, however, cattle now are fed primarily in the central portion of the United States. This relatively recent regionalization of cattle feeding activity is illustrated in Exhibit B, which depicts the distribution of such activity in 1969 and 1978. In order to reduce their costs, many slaughtering plants have followed the cattle feeders into the central United States. Nevertheless, a substantial number of slaughtering plants remain outside of this area. This distribution of buyers and sellers is consistent with the existence of a national market for the procurement of fed cattle, particularly given the fact that two of the primary determinants of fed cattle prices, the price of feeder cattle and the price of beef, are determined in national markets.

18. An important determinant of the scope of the geographic market for the procurement of fed cattle is transportation costs. If the cost to a feedlot of shipping fed cattle an *additional* 100 miles beyond the area in which it makes most of its sales is relatively low, a packer in that area cannot lower his price significantly without losing his fed cattle supply to another, and perhaps more distant, packer. The cost of transporting fed cattle consists of three components: freight, shrinkage, and risk of carcass injury. While freight costs are usually assessed on a per-mile basis, shrinkage normally occurs within the first 75 to 100 miles, and carcass injury and most bruises occur during loading and unloading, or in holding pens. Hence, once the cost of the first 150 to 200 miles has been incurred, the marginal cost of transporting fed cattle additional miles is modest relative to the value of the cattle.

19. I have reviewed the study published in 1982 by the Packers and Stockyards Administration of the U.S. Department of Agriculture entitled "Geographic Markets and Prices for Fed Steers and Heifers," and find their data concerning the costs of transporting cattle in 1979 consistent with my experience and research. The study found that the cost of shipping a hundredweight of cattle an additional 100 miles beyond an initial distance of 48 to 150 miles ranged from 7 cents to 32 cents, with an average of about 20 cents. I have concluded, as did the study, even the highest of these estimates, 32 cents, is small relative to cattle prices, or relative to typical packer margins.

20. Buyers and sellers throughout the country have sufficient information about the pricing of fed cattle to be able to detect and act immediately on price aberrations if and when they occur. Many packers have buyers who travel to several feedlots each day. These agents not only gather information for buyers, their negotiations and purchases impart information to sellers. Moreover, commercial feedlots today feed far more cattle for clients than for their own accounts; as a result, they have become increasingly

sophisticated. They employ professional salesmen to represent their clients as well as to sell the cattle on the feedlot. These salesman not only know the market for fed cattle as well as the professional buyers with whom they deal, they also have equal negotiating skills. The price competition that exists both between sellers and buyers and within each group is vigorous. As a result, local price quotes that diverge from the prevailing market are very conspicuous and will cause buyers and sellers, regardless of whether they normally buy in the particular area, to react accordingly.

21. All buyers and sellers have access to many alternative public sources of price information, including the USDA's Federal Market News, The National Provisioner's Yellow Sheet, and the major commodities markets where future contracts are traded. Moreover, each buyer and seller has its own knowledge of the market and contacts within it, often exploiting the latter when it believes that prices are too high or too low. Finally, there are professional agent-middlemen, on both the buying and selling side of the market, whose business relies, in large part, on being able to locate areas of the country where prices have temporarily diverged from the competitive price. All of these are ways in which a buyer or a seller of fed cattle, when faced with a too high or too low a price, can quickly locate alternative offers; thus, they are the means by which any temporary aberrations in the price of fed cattle will be quickly bid away.

22. Thus, my experience and research has led me to conclude that prices of fed cattle in different areas of the country will tend to be equal, with any sustained divergences reflecting only the incremental cost of transporting cattle to a more distant area. The Packers and Stockyards Administration's "Geographic Markets" study tested this hypothesis for two regions, designated as the Nebraska-Iowa and High Plains regions, as well as for three subregions within the High Plains. The study concluded that

there were significant movements of cattle between the two regions, indicating that there were numerous occasions on which price differences between the two markets made it profitable to buy or sell in the other regions. The study reached the same finding with regard to the three submarkets. Moreover, the study concluded that the low cost of transporting cattle confirmed its finding that there is a high degree of price interdependence both between the two regions, and, independently, among three subregions. Each of these findings is fully consistent with my research and experience.

23. Moreover, in my judgment, the same conclusions would apply equally to the subregions within the Nebraska-Iowa region, as well as to any geographic area outside of the two regions studied. Thus, while I concur with the study in its conclusion that the relevant geographic market for the procurement of fed cattle must be *at least* as large as the combined High Plains/Nebraska-Iowa regions, in my judgment, the relevant market is the continental United States.

24. Exhibit C supports my conclusion. It summarizes the results of a statistical analysis of variations in the prices of fed steers for ten locations across the country. The data shows that for any given pair of locations, the variations in the prices of fed steers are almost identical. In my judgment, it would be very unlikely that changes in fed steer prices across the country would be highly correlated unless there was significant price interdependence among the regions, that is, unless the market for the procurement of fed cattle is national in scope.

25. If Excel (after its acquisition of Spencer), or any other beef packer, raised the price it was willing to pay for fed cattle, it could not maintain such a price premium. A packer's offer to pay more than the market price for fed cattle would be met immediately by numerous offers to sell, many of which would come from beyond the pack-

er's traditional procurement area. If the packer continues to slaughter at its current rate, however, it will not increase the demand for fed cattle, and, as a result, it will not have any affect on the market price. In fact, the only result of its action will be that it will pay a higher price for fed cattle than any other packer. Accordingly, it would be irrational for anyone to engage in this form of pricing activity.

26. Similarly, if Excel, or any other beef packer, attempted to lower the price it paid for fed cattle, it would not have any affect on the market price. No feedlot owner will accept a price below that which he believes other packers in the market will pay. Any owner confronted with a low bid will refuse to sell to the particular bidder and, in turn, will find another packer that is willing to pay the market price. Since a feedlot owner can hold onto a steer or heifer for one to two weeks after it is ready for slaughter, no owner will be compelled to sell his cattle at the lower price. Thus, any packer who refused to pay the market price would find himself without cattle on that day.

27. Since the market for feeder cattle and the market for beef are indisputably national in scope, it is incorrect to presume that the market for the intermediate product, fed cattle, is limited to the geographic area in which many feedlots and packers are located. The market for the procurement of fed cattle is characterized by low transportation costs relative to the product's price, and good information flows between various regions of the country. As a result, the actual pricing of fed cattle nationwide behaves consistently with the predictions of the competitive spatial equilibrium model. Prices tend to equality, with sustained divergences reflecting only the incremental transportation costs to a particular locality. If a purchaser of cattle were to attempt to bid up (or down) the price of cattle, competitive forces would bring the price back to the competitive level in a very short time.

28. Thus, the relevant geographic market in which to evaluate the competitive effects of the instant merger on cattle procurement is the continental United States. As a result, it is my judgment that prices for fed cattle presently are determined in a competitive market, and that the market will remain competitive regardless of whether Excel's proposed acquisition of Spencer is consummated.

I declare under penalty of perjury
that the foregoing is true and correct.

Executed on October 2, 1983.

/s/ Thomas Taylor Stout

Thomas Taylor Stout

EXHIBIT A
RESUME

Thomas T. Stout

Department of Agricultural Economics and Rural Sociology
The Ohio State University

Education

BSc The Ohio State University, Agronomy, June, 1952.

MSc The Ohio State University, Agricultural Economics, December, 1953.
Thesis: Retail Meat Marketing in Ohio.

PhD The Ohio State University, Agricultural Economics, December, 1956.
Dissertation: Initial Inquiries Into the Possibility of
Formula Pricing Live-Graded Market Hogs
Under Changing Economic Conditions.

Experience

Post-Doctoral Fellow, Agricultural Economics, Purdue University, 1957.

Assistant Professor, Agricultural Economics, Purdue University, 1957.

Associate Professor, Agricultural Economics, The Ohio State University, July 1, 1961 to June 30, 1966.

Professor, Agricultural Economics, The Ohio State University, July 1, 1966 to present.

Sabbaticals and Leaves:

July 25, 1969 to August 1, 1970:
—Staff Economist, President's Council of Economic Advisers, July 25, 1969 to September 1, 1969.

—Economist, Economic Research Service, USDA, September 2, 1969 to July 31, 1970.

August 25, 1976 to December 20, 1976:
—Visiting Professor, Department of Rural Economy, University of Alberta, Edmonton.

Professional Activities

All university work has been on teaching-research appointments, with emphasis increasingly on teaching since mid-1970's.

Courses taught include: Undergraduate (U)/Graduate (G)
—Livestock Marketing (25 years) UG
—Introductory Agricultural Marketing (15 years) U
—Marketing Economics in Agriculture (5 years) G
—Agricultural Policy (11 years) U
—Research Methods (12 years) G
—Introductory Sociology and Economics in Agriculture (9 years) U
—Agri-Industry Organization and Public Policy (2 years) UG

Research projects have included topics in technological change in U.S. agriculture, livestock marketing channels, livestock and meat pricing and price forecasting, cattle buyer judging accuracy, meat wholesaling channels, feedlot operating costs, and various studies unrelated to the livestock industry such as aerial application costs in agriculture, disabling accidents in agriculture, conflict/compatibility among rural farm/nonfarm residents, and (currently) marketing improvements for Ohio apple growers.

Selected Publications

Henning, G.F., and Stout, Thomas T., "Formula-Pricing of Hogs Under Present Day Conditions", Ohio Agricultural Experiment Station *Research Bulletin* 801, March 1958.

Stout, Thomas T., and Ruttan, Vernon W., "Regional Patterns of Technological Change in American Agricul-

ture", *Journal of Farm Economics*, Vol. XL, No. 2, May 1958.

Stout, Thomas T., and Cox, Clifton B., "Farm-to-Market Hog Shrinkage", Purdue Agricultural Experiment Station *Research Bulletin* 685, September 1959.

Ruttan, Vernon W., and Stout, Thomas T., "Regional Differences in Factor Shares in American Agriculture", *Journal of Farm Economics*, Vol. XLII, No. 1, February 1960.

Stout, Thomas T., Cox, C.B., Spurlock, D., and Wiley, J.R., "Changes in Indiana Livestock Marketing, 1940-1956", Purdue Agricultural Experiment Station *Research Bulletin* 707, September 1960.

Stout, Thomas T., and Armstrong, Jack H., "Shrink and Yield in Market-Fed Hogs", Purdue Agricultural Experiment Station *Research Bulletin* 710, December 1960.

Stout, Thomas T., "Packer Procurement Channels for Slaughter Livestock in Indiana", Purdue Agricultural Experiment Station, Research Progress Report No. 5, March 1962.

Stout, Thomas T., and Feltner, Richard L., "Price Relationships in the Market for Slaughter Hogs in Indiana", Purdue Agricultural Experiment Station *Research Bulletin* 746, June 1962.

Stout, Thomas T., and Bentley, Ernest R., "Methodology and Implications of Spatial Equilibrium Solutions in the Pork Sector of the Livestock-Meat Economy", *Journal of Farm Economics*, Vol. XLIV, No. 5, December 1962.

Futrell, Gene A., and Stout, Thomas T., "Foreign Trade in Livestock Products", Cooperative Extension Service, The Ohio State University, Extension MM-229 (also listed as Departmental Series AE 353), October 1963.

Stout, Thomas T., Bentley, Ernest R., and Walker, Francis E., "Econometric Generalizations of the Ohio Hog-Pork Industry in Interregional Competition", Ohio Agricultural Experiment Station *Research Bulletin* 950, October 1963.

Hartman, Lenore A., and Stout, Thomas T., "Lamb Merchandising in Ohio Retail Stores—With Related Industry Surveys", Ohio Agricultural Experiment Station *Research Circular* 131, June 1964.

Williams, Willard F., and Stout, Thomas T., *Economics of the Livestock-Meat Industry*, The Macmillan Publishing Company, New York, 1964.

Stout, Thomas T., and Dickey, Ronald W., "The Ohio Livestock Slaughter Industry—A Survey", Ohio Agricultural Experiment *Research Circular* 134, December 1964.

Futrell, Gene A., Walker, Francis E., and Stout, Thomas T., "Econometric Generalizations of the Ohio Beef and Pork Industries in Interregional Competition", Ohio Agricultural Research and Development Center, *Research Bulletin* 974, November 1965.

Stout, Thomas T., "When Meat Directors Talk Shop", presented at an IGA Management Seminar, Drake-Oakbrook Hotel, Chicago, September 14, 1967.

Stout, Thomas T., and Hawkins, Murray H., "Implications of Changes in the Methods of Wholesaling Meat Products", *American Journal of Agricultural Economics*, Vol. 50, No. 3, August 1968. Pages 660-675.

Stout, Thomas T., Hawkins, Murray H., and Marion, Bruce W., "Meat Procurement and Distribution by Ohio Grocery Chains and Affiliated Wholesalers", Ohio Agricultural Research and Development Center, *Research Bulletin* 1014, October 1968.

Stout, Thomas T., "Implications of Conglomerate Mergers to Food Distribution in the 1970's", *Journal of Food*

Distribution Research, Vol. 1, No. 1, October 1969. Pages 72-89.

Stout, Thomas T., (Editor) "Long-Run Adjustments in the Livestock and Meat Industry: Issues and Alternatives", North Central Regional Research Publication 199, Ohio Agricultural Research and Development Center, *Research Bulletin* 1037, March 1970.

Stout, Thomas T., "Performance and Control in the U.S. Beef Industry in 1980", Canadian Journal of Agricultural Economics, Annual Workshop, Proceedings, June 1970. Pages 1-19.

Stout, Thomas T., "Unit Pricing of Grocery Items: Some Policy Implications", Economics of Consumer Protection (Loys L. Mather, Editor), Interstate Printers and Publishers, Danville, Illinois, 1971. Pages 139-144.

Stout, Thomas T., "Prospects for the U.S. Cattle Industry in the 1970's", presented to the 75th Annual Convention of the *Western Stock Growers' Association,* Banff, Alberta. ESO-55, February 1971.

Stout, Thomas T., "Prospects for the U.S. Pork Industry in the 1970's", presented at the North Central Regional Farm Management Extension Conference, Center for Tomorrow, The Ohio State University, April 6, 1971. Published as AE 4276, Department of Agricultural Economics, University of Illinois, Urbana.

Stout, Thomas T., "The Future Belongs to Those Who Prepare for It", presented to the 55th Annual Convention of the California Cattlemen's Association, Oakland, California, ESO-56, December 1971.

Stout, Thomas T., and Berg, James F., "Economic Potentials for Ohio Cattle Feeding", Ohio Agricultural Research and Development Center, *Research Bulletin* 1055, June 1972.

Stout, Thomas T., "Systems Management in the Beef Industry", presented at the 9th Annual Cattlemen's Short Course, Banff, Alberta, ESO 116, November 1972.

Stout, Thomas T., "Defining Marketing and Evaluating Marketing Performance", presented at the Ninth Annual Cattlemen's Short Course, Banff, Alberta, ESO-124, December 1972.

Stout, Thomas T., "Carcass Weight and Grade Pricing", presented at the Ninth Annual Cattlemen's Short Course, Banff, Alberta, ESO 125, December 1972.

Stout, Thomas T., "Organization and Control in Agriculture", presented at the 9th Annual Cattlemen's Short Course, Banff, Alberta, ESO 126, December 1972.

Stout, Thomas T., and Doehler, R.C., "Evaluating Economic Performance in Food Retailing", Journal of Food Distribution Research, Vol. 5, No. 1, pages 32-42, February 1974.

Stout, Thomas T., "The Challenge of Change", keynote address delivered at the Seventh Annual *California Livestock Symposium,* Fresno, May 29, 1975. ESO-306, Department of Agricultural Economics and Rural Sociology, The Ohio State University, May 1975.

Stout, Thomas T., "Marketing Technology in the U.S.A.", delivered at the 1976 *Agricultural Marketing Business Forum,* Banff, Alberta, January 12-14, 1976. ESO-308, Department of AERS, The Ohio State University, January, 1976.

Stout, Thomas T., "The Cost of Uncertainty and the Price of Risk", presented at the Twenty-third Annual Convention of the *California Cattle Feeders' Association,* Santa Barbara Biltmore, March 18-21, 1976. ESO 331, Department of AERS, The Ohio State University, Columbus, March 1976.

Stout, Thomas T., "Recognizing Gaps in Market Intelligence", presented at the National Market News Conference, Kansas City, Missouri, September 24-25, 1976. ESO 369, Department of AERS, The Ohio State University, September 1976.

Stout, Thomas T., "Some Perspectives on Public Policy and the Meat-Grain Interface in the Prairie Provinces", presented at the *Canadian Meat-Grain Interface Project* (second conference in a series of four), Edmonton, Alberta, January 6-7, 1977. ESO 401, Department of AERS, The Ohio State University, January 1977.

Stout, Thomas T., "Canadians at the Meat-Grain Interface" (fourth conference in a series of four), Saskatoon, Saskatchewan, March 2-4, 1977. ESS 541, Department of AERS, The Ohio State University, March 1977.

Stout, Thomas T., "Economic Man, Heroic Man", presented at the *82nd Annual Convention of the Western Stockgrowers Association,* Red Deer, Alberta, February 3, 1978. ESO 466, Department of AERS, The Ohio State University, February 1978.

Stout, Thomas T., "Cattle: An Industry of Growth and Change", *Ohio Report* (of the Ohio Agricultural Research and Development Center), March-April 1979.

Stout, Thomas T., "Cattle and Beef: Regional Changes in Production, Marketing, Slaughter and Consumption", *Ohio Report* (of the Ohio Agricultural Research and Development Center), May-June 1979.

Stout, Thomas T., "Changing Hog Production Patterns in the U.S.", *Ohio Report* (of the Ohio Agricultural Research and Development Center), November-December 1979.

Stout, Thomas T., "The Future of the Livestock Industry", presented at the *Midwest Agricultural Outlook Con-*

ference, Columbus, Ohio, August 15, 1979. ESS-580, Department of AERS, The Ohio State University, August 1979.

Stout, Thomas T., "Decline of the Ohio Cattle Enterprise", Socio-Economic Information, Department of AERS, Ohio Cooperative Extension Service, No. 631, March 1981.

Stout, Thomas T., "Long Term Prospects for the North American Livestock Industry", presented at the Canadian livestock outlook conference, *Taking Stock,* October 13-14, 1982. ESO 971, Department of Agricultural Economics and Rural Sociology, The Ohio State University, October 1982.

EXHIBIT B

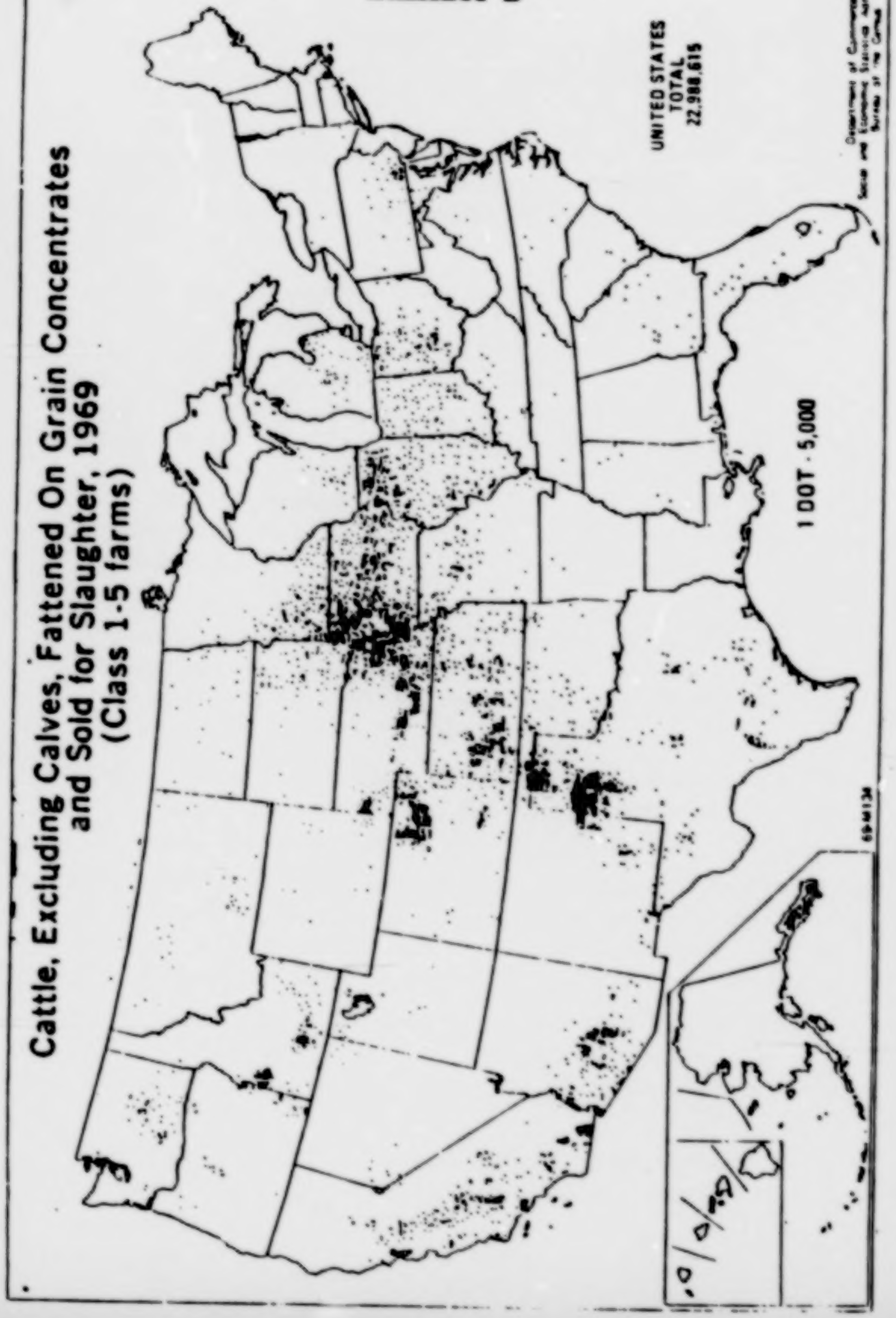


EXHIBIT B CONT

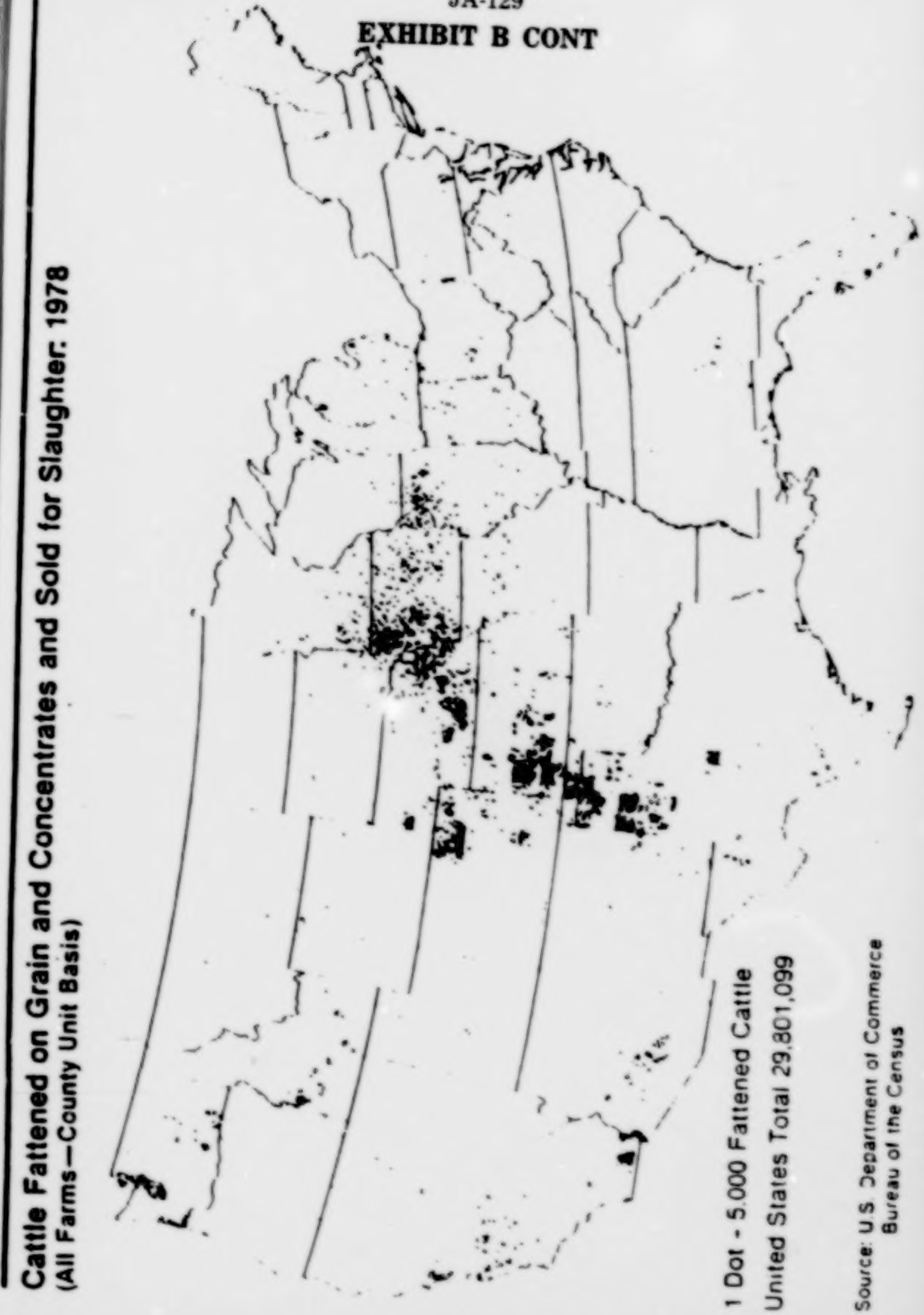


EXHIBIT C

CORRELATION AMONG REGIONAL CATTLE PRICES*

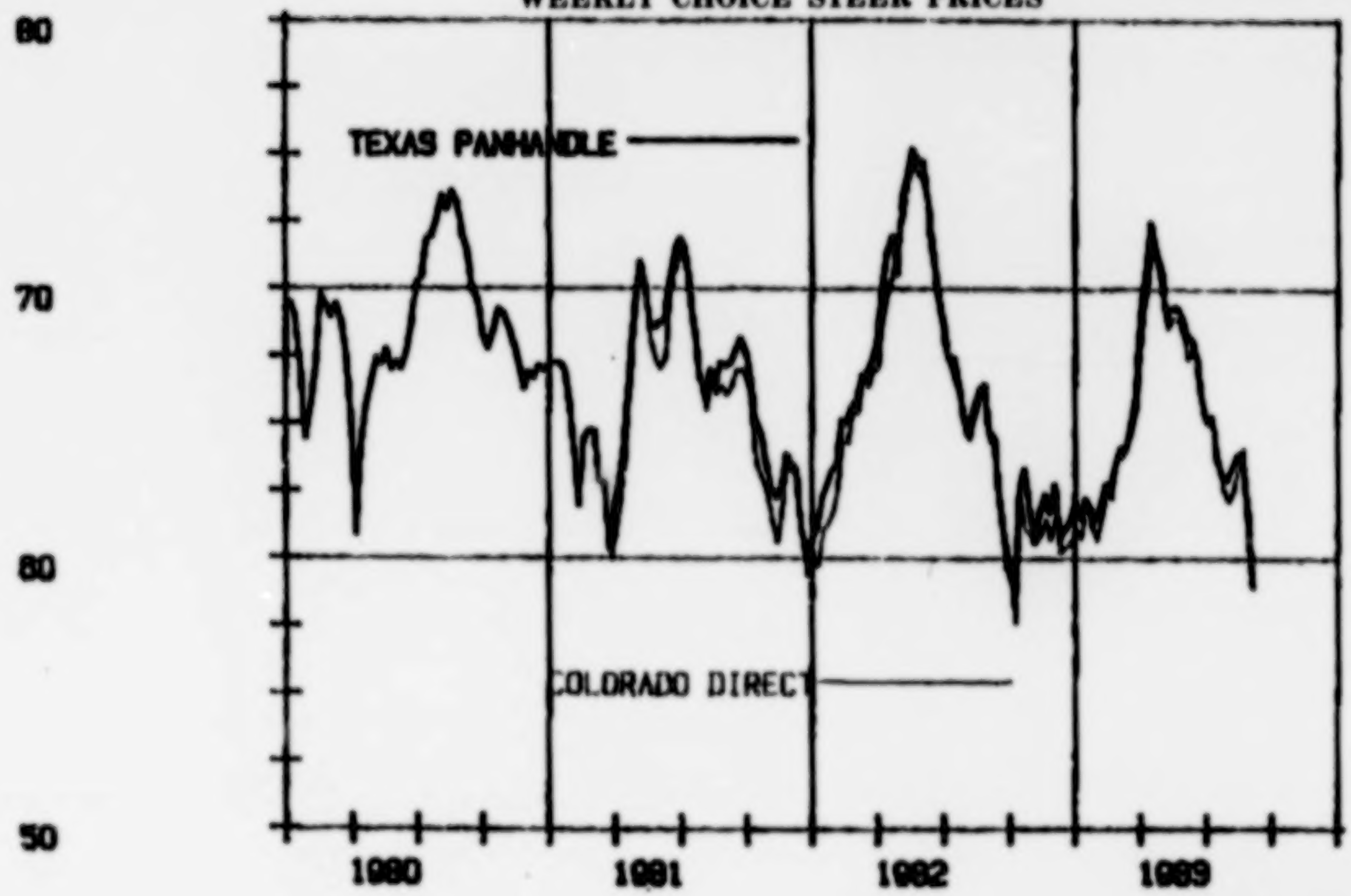
Matrix of Coefficients of Determinants (R^2)

	Cal	Oreg.	Tex	Col.	Omaha	Sioux City	Iowa	St. Paul	Ill	Lancaster Pa
Cal.	1	.933	.927	.924	.902	.908	.921	.893	.923	.820
Wash-Oreg.	—	1	.946	.963	.972	.954	.967	.949	.950	.893
Tex.	—	—	1	.985	.948	.949	.950	.929	.933	.839
Colo.	—	—	—	1	.977	.946	.962	.939	.944	.850
Omaha	—	—	—	—	1	.980	.975	.991	.963	.894
Sioux City	—	—	—	—	—	1	.975	.963	.966	.884
Iowa South	—	—	—	—	—	—	1	.979	.986	.880
St. Paul	—	—	—	—	—	—	—	1	.974	.870
Ill.	—	—	—	—	—	—	—	—	1	.864
Lancaster Pa	—	—	—	—	—	—	—	—	—	1

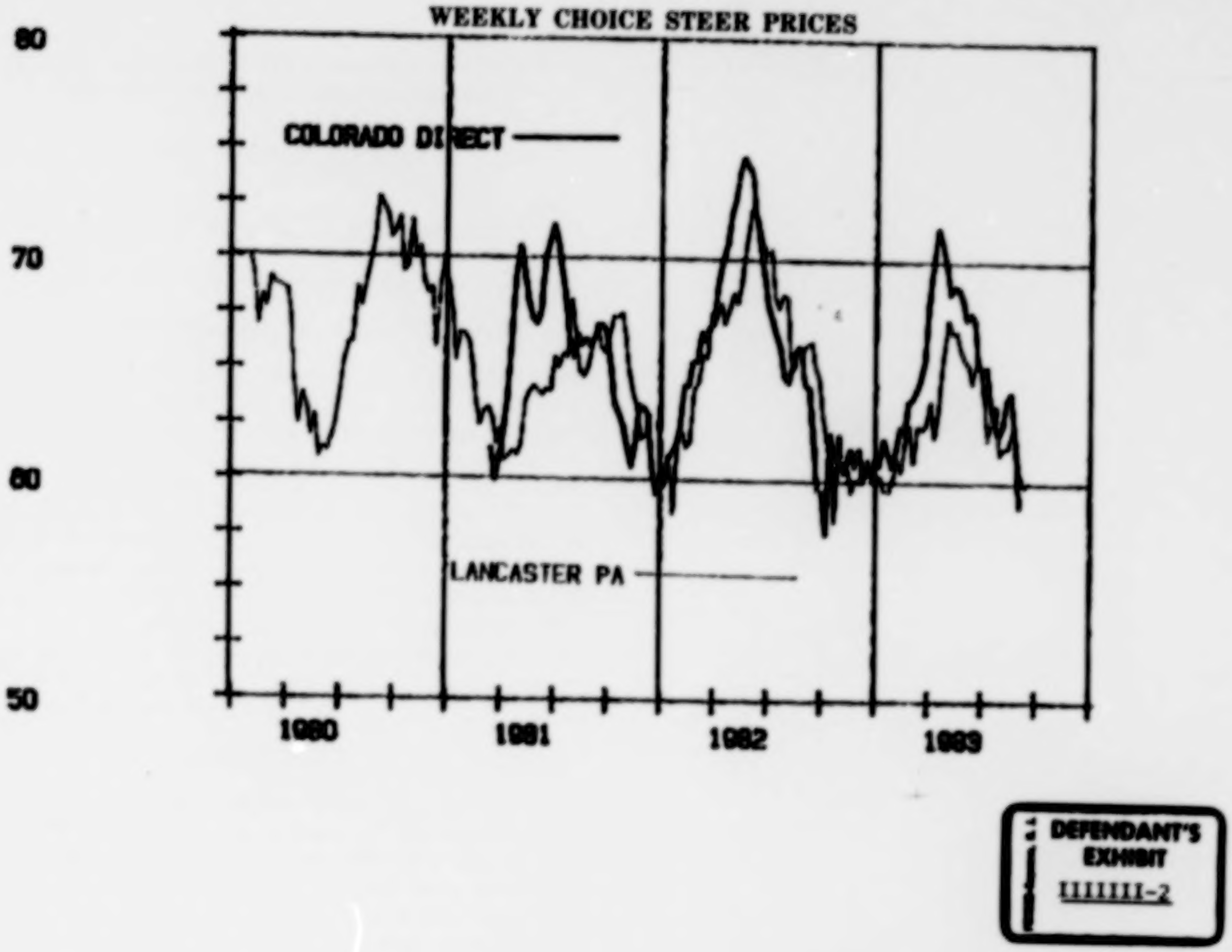
*Measured on weekly average prices of 900-1100 lb. choice steers, yield grades 2-4 January 1, 1982 through August 27, 1983

Source: USDA, Agricultural Marketing Service, "Livestock, Meat, and Wool Market News—Weekly Summary and Statistics"

WEEKLY CHOICE STEER PRICES



DEFENDANT'S EXHIBIT
IIIIIII-1


WEEKLY CHOICE STEER PRICES
80
70
60
50
COLORADO DIRECT
LANCASTER PA
1980
1981
1982
1983
DEFENDANT'S
EXHIBIT
IIIIIII-2

Def. Ex. 7M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DECLARATION OF WILLIAM B. BURNETT

I, William B. Burnett, declare and say:

BACKGROUND AND QUALIFICATIONS

1. I currently am Vice-President of Glassman-Oliver Economic Consultant's, Inc. Glassman-Oliver is an economic consulting firm specializing in antitrust and government regulation. Prior to employment with Glassman-Oliver in October, 1982, I was an economist in the Bureau of Economics of the Federal Trade Commission ("FTC"). While at the FTC, I made many market share analyses of the general nature described below. I have Masters Degrees in Economics from Cornell University and the University of Wisconsin-Madison and have taught economics courses at the college level. My educational and employment background are fully set forth in my curriculum vitae, attached hereto.

ASSIGNMENT

2. I have calculated market shares and concentration indices for the principal producers of beef products in product markets for (1) the production and sale of fabricated beef and all beef products; and (2) the procurement of cattle. My calculations assume a geographic market for fabricated beef and all beef products that is nationwide and a geographic market for cattle procurement that is

east of the Rocky Mountains. The accompanying Declaration of Dr. Michael Klass sets forth in detail the definition and nature of the markets I have assumed for purposes of calculating market share and concentration levels.

CONCLUSIONS

3. Tables A to G attached hereto set forth my conclusions regarding market share and concentration measures. Each table presents relevant market share and concentration indices based on the available data. Tables A and B set forth my conclusions regarding the market shares for cattle procurement in the geographic area east of the Rocky Mountains. Table C sets forth my conclusions regarding the market shares for beef fabrication. Tables D and E contain my conclusions regarding market shares for a market that encompasses all beef products but excludes imports of such products into the United States. Tables F and G contain my conclusions regarding market shares for a market that encompasses all beef products and includes imports of beef into the United States. The tables present *post-merger* HHI's in the 674 to 815 range for the cattle procurement market, approximately 887 for the beef fabrication market, and 543 to 691 for the beef products market. The assumptions on which each table is based are contained in the headings and footnotes to each table.

DATA

4. The calculations described above are based on the slaughter and fabrication *capacities* of firms producing beef products and on the actual 1982 *production* of five of the largest industry producers. The initial data providing information as to the capacity of certain slaughter and fabrication firms are contained in Plaintiff's Exhibit 26 (attached hereto as Appendix 1), a document originally prepared in the normal course of business by individuals at Excel and used to assess Excel's competition. This document, created in January 1982 and updated in April 1983, sets forth the beef slaughter and fabrication capacities of individual plants. To my knowledge, Exhibit 26 is the most comprehensive data available analyzing capacity on a plant-by-plant basis. I have adjusted some of the data in Exhibit 26 to reflect changes that have occurred since April 1983 and to correct significant errors in the April estimates. Those adjustments are set forth in Appendix 2, attached hereto. To the extent information on the capacity of individual firms is available, I have verified the accuracy of the estimates on which I relied to measure shares. Reference to government submittals, publicly filed financial documents, the business and trade press, and knowledgeable persons in the industry generally confirm the accuracy of the capacity data used for my conclusions. In particular, I have been able to verify the capacity estimates for the largest slaughter and fabrication firms. I have used Mr. Kenneth Monfort's estimates of the plant capacities of Monfort's plants. I also have used Mr. Monfort's estimates to verify capacity estimates for one other plant. In addition, I was able to verify the estimates for many of the smaller firms. Appendix 3, attached hereto, sets forth the capacity estimates that I have verified and the source of verification.

5. In addition to verifying the capacity estimates of individual firms, I compared actual 1982 boxed beef production by the four and eight largest slaughter/fabricators, as reported by the U.S. Department of Agriculture ("USDA"), with the capacity estimates made by Excel. USDA reports only boxed beef production by slaughtering packers with annual livestock purchases greater than $500,000. It does not collect data on boxed beef production by non-slaughtering producers. USDA reported that in 1982 the four and eight largest slaughter/fabricator's totaled 9,631,299 and 11,973,841 carcasses, respectively. The total annual fabricating capacity of the four and eight largest slaughter/fabricators, according to the Excel estimates,

was 10,907,000 and 13,969,800 carcasses, respectively (assuming a 260 day year). Accordingly, actual production was 88.3% of capacity for the four largest firms and 85.8% for the eight largest firms. The Excel capacity estimates therefore bear the correct relationship to actual production—*i.e.*, capacity exceeds production by an amount within the ambit of operating ratios of the manufacturing sector of the U.S.

6. The second source of data I used to calculate market shares for some firms are data, which have become available during the course of this litigation, for actual 1982 cattle slaughter. Cattle slaughter in 1982 for four of the largest slaughters (IBP, Excel, Monfort and Swift) is taken from reports filed with the Packers and Stockyards Administration of the USDA. An estimate for Spencer's 1982 slaughter is taken from an internal Excel memorandum. These data provide the basis for the calculations based on actual production (rather than capacity) presented in Tables A, D and F.

7. In general, and after the adjustments described above, I believe that the data are reliable and are of the nature relied upon by experts in my field. While capacity estimates for some plants and firms, varied among different sources, such variances were not significant. Moreover, estimates of capacity vary in every analysis of this kind. I have, in the past, relied on this kind of data for market share and concentration calculations. I have been conservative in attempts to select among alternatives to avoid substantially understating the market shares of the large firms, and particularly of Excel and Spencer.

THE MARKET SHARE AND CONCENTRATION ESTIMATES ARE OVERSTATED

8. The market shares and concentration indices overstate actual market shares for several reasons. First, for Tables B, C, E and G, when alternative capacity estimates

were available for Excel and Spencer, I selected the higher estimates for use in the calculations. I chose the Excel employee's estimates in Exhibit 26 for slaughter and fabrication capacity because they were higher than those submitted to the Department of Justice ("DOJ"). On the other hand, I chose the estimates of Spencer's capacity submitted by Excel to the DOJ because the estimates provided DOJ were substantially higher than those contained in Exhibit 26. Second, for Tables B, E and G, which calculate shares based on estimated capacity relative to a market universe of 1982 slaughter, the shares are overstated because actual *production* (slaughter) is less than slaughter capacity. The market universe is therefore too small. Third, for Table C the market universe on which the calculations are based is the sum of the capacities for firms listed in the Excel document (Exhibit 26). Not all fabrication plants in the United States are included in Exhibit 26. The appropriate universe should accordingly be larger and the resulting market shares of the included firms would be lower. Fourth, capacities were compiled for firms with daily capacity of at least 1,000 per day. The share of the market remaining to smaller firms was assumed, however, to be divided among firms with 1,000 per day capacity. It is thus a maximum HHI since if the capacities of smaller firms had been listed, their calculated shares would have been lower. Similarly, in tables relating to actual production, the portion of the market not supplied by the large firms was assumed to be divided among firms of size equal to the smallest of the listed firms.

APPROPRIATE MEASURES OF MARKET SHARES AND CONCENTRATION

9. In my opinion, it is appropriate to use either capacity or actual production to measure market shares and concentration in this case. They are among many measures, including sales, employment, reserves, value added, and assets, commonly used by economists to establish the rel-

ative size of a firm or group of firms to the total market. As a threshold matter, capacity data are the most comprehensive data available for the beef industry on an individual firm basis. Obviously, individual firm market shares and concentration figures cannot be calculated in the absence of such a firm-by-firm breakdown. Quite apart from availability, capacity is a desirable measure because it gauges the extent to which a firm or group of firms can affect market output and influence market price. In this regard, capacity encompasses the potential of firms already supplying the product to change its rate of output and influence market price. Both capacity and production are frequently used by economists to measure market shares and I have used both in the past.

I swear under penalty of perjury that the foregoing is true and correct.

Executed in Denver, Colorado on October 3, 1983.

/s/ WILLIAM B. BURNETT

WILLIAM B. BURNETT

TABLE A
ESTIMATED MARKET SHARES AND CONCENTRATION
BASED ON 1982 SLAUGHTER*
EAST OF THE ROCKY MOUNTAINS

	Market Share	Contribution To HHI
IBP	16.5	272
Excel	8.6	74
Spencer Foods	4.8	23
Swift Independent	3.9	15
Monfort of Colorado	3.0	9
Pre-Merger Four-Firm Concentration		33.8
Maximum Pre-Merger HHI		591
Change in HHI Resulting From Acquisition		83
Maximum Post-Merger HHI		674

* Market universe estimated based on 1982 commercial cattle slaughter for states east of the Rocky Mountains (total U.S. slaughter less slaughter in Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Utah and Washington). Firm estimates based on actual total slaughter by each firm.

TABLE B
ESTIMATED MARKET SHARES AND CONCENTRATION
BASED ON SLAUGHTER CAPACITY*
EAST OF ROCKY MOUNTAINS
SPENCER'S SCHUYLER PLANT ASSUMED OPEN

	Market Share	Contribution To HHI
IBP	20.4	416
Excel	10.5	110
Swift Independent	5.8	34
Spencer Foods	5.5	30
Monfort of Colorado	5.5	30
Sterling Beef	3.9	15
National Beef Packing	2.5	6
Union Packing	2.0	4
Val-Agri	1.7	3
Pre-Merger Four-Firm Concentration		42.2
Post-Merger Four-Firm Concentration		47.7
Pre-Merger Eight-Firm Concentration		56.1
Post-Merger Eight-Firm Concentration		57.8
Maximum Pre-Merger HHI		699
Change in HHI Resulting From Acquisition		116
Maximum Post-Merger HHI		815

* Capacity universe estimate based on 1982 commercial cattle slaughter for states east of the Rocky Mountains (total U.S. slaughter less slaughter in Alaska, Arizona, California, Hawaii, Idaho, Nevada, Or-

egon, Utah and Washington). Firm capacity based on Excel estimates as revised.

TABLE C
ESTIMATED MARKET SHARES AND CONCENTRATION BASED ON FABRICATION CAPACITY*
SPENCER'S SCHUYLER PLANT ASSUMED OPEN

	Market Share	Contribution To HHI
IBP	19.2	369
Excel	14.4	207
Monfort of Colorado	5.6	31
Spencer Foods	5.4	29
Swift Independent	4.6	21
National Beef Packing	2.9	8
Kroger	2.9	8
Winn Dixie	2.9	8
Sterling Beef	2.7	7

Pre-Merger Four-Firm Concentration	44.6
Post-Merger Four-Firm Concentration	49.2
Pre-Merger Eight-Firm Concentration	57.9
Post-Merger Eight-Firm Concentration	60.6
Maximum Pre-Merger HHI	731
Change in HHI Resulting From Acquisition	156

Maximum Post-Merger HHI	887

* Universe is the sum of the plant capacity estimates made by Excel as revised. Firm capacity based on Excel estimates as revised.

TABLE D
ESTIMATED MARKET SHARES AND CONCENTRATION BASED ON 1982 SLAUGHTER*
ENTIRE UNITED STATES

	Market Share	Contribution To HHI
IBP	16.4	269
Excel	7.4	55
Spencer Foods	4.2	18
Swift Independent	3.3	11
Monfort of Colorado	2.6	7
Pre-Merger Four-Firm Concentration		31.3
Maximum Pre-Merger HHI		542
Change in HHI Resulting From Acquisition		62
Maximum Post-Merger HHI		604

* Market universe is total U.S. 1982 total cattle slaughter. Firm estimates based on actual total slaughter by each firm.

TABLE E
ESTIMATED MARKET SHARES AND CONCENTRATION BASED ON SLAUGHTER CAPACITY*
SPENCER'S SCHUYLER PLANT ASSUMED OPEN

	Market Share	Contribution To HHI
IBP	19.8	392
Excel	9.1	83
Swift Independent	5.1	26
Spencer Foods	4.7	22
Monfort of Colorado	4.7	22
Sterling Beef	3.4	12
National Beef Packing	2.2	5
Union Packing	1.7	3
Washington Beef	1.5	2
Pre-Merger Four-Firm Concentration		38.7
Post-Merger Four-Firm Concentration		43.4
Pre-Merger Eight-Firm Concentration		50.7
Post-Merger Eight-Firm Concentration		52.2
Maximum Pre-Merger HHI		605
Change in HHI Resulting From Acquisition		86

Maximum Post-Merger HHI	691

* Capacity universe estimate based on total U.S. 1982 cattle slaughter. Firm capacity based on Excel estimates as revised.

TABLE F
ESTIMATED MARKET SHARES AND CONCENTRATION BASED ON 1982 SLAUGHTER*
ENTIRE UNITED STATES
MARKET UNIVERSE ASSUMED TO INCLUDE IMPORTS

	Market Share	Contribution To HHI
IBP	15.5	240
Excel	7.0	49
Spencer Foods	3.9	15
Swift Independent	3.2	10
Monfort of Colorado	2.5	6
Pre-Merger Four-Firm Concentration		29.6
Maximum Pre-Merger HHI		488
Change in HHI Resulting From Acquisition		55
Maximum Post-Merger HHI		543

* Market universe is based on total U.S. 1982 cattle slaughter plus imports into the U.S. Firm estimates based on actual total slaughter by each firm.

TABLE G
ESTIMATED MARKET SHARES AND CONCENTRATION
BASED ON SLAUGHTER CAPACITY*
SPENCER'S SCHUYLER PLANT ASSUMED OPEN
MARKET UNIVERSE ASSUMED TO INCLUDE IMPORTS

	Market Share	Contribution To HHI
IBP	18.7	350
Excel	8.6	74
Swift Independent	4.8	23
Spencer Foods	4.5	20
Monfort of Colorado	4.5	20
Sterling Beef	3.2	10
National Beef Packing	2.0	4
Union Packing	1.6	3
Washington Beef	1.4	2

Pre-Merger Four-Firm Concentration	36.6
Post-Merger Four-Firm Concentration	41.1
Pre-Merger Eight-Firm Concentration	47.9

Post-Merger Eight-Firm Concentration	49.3
Maximum Pre-Merger HHI	546
Change in HHI Resulting From Acquisition	77
Maximum Post-Merger HHI	623

* Capacity universe estimate based on total U.S. 1982 cattle slaughter plus imports into the U.S. Firm capacity based on Excel estimates as revised.

[Appendices Omitted in Printing]

Def. Ex. 7N

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DECLARATION OF DR. MICHAEL W. KLASS

Dr. Michael W. Klass declares:

1.1 I am a Vice President of Glassman-Oliver Economic Consultants, Inc. Glassman-Oliver is a private consulting firm in Washington, D.C. specializing in the analysis of antitrust and other economic and business issues. In my work at Glassman-Oliver, I have analyzed numerous horizontal mergers; my analyses have been addressed to evaluating the mergers' possible competitive effects, and have included measurement and assessment of market share and concentration figures, the delineation of relevant product and geographic markets as well as consideration of entry conditions and other determinants of market performance.

1.2 On August 15, 1983, I and Glassman-Oliver were retained by the law firm of Morrison & Foerster, on behalf of Cargill, Inc., and Excel Corporation, to act as an economic consultant in this case. My assignment was to analyze and to form an opinion on whether it is likely that Excel Corporation's acquisition of the Spencer Beef Division of Land O'Lakes, Inc., will have anti-competitive effects. In carrying out this assignment, I have reviewed the complaint as well as other, major parts of the record in this action, including interrogatory answers, depositions of the parties' officers and other witnesses, and many of the documentary materials the parties have produced in the course of discovery. I have reviewed the professional

economic literature that, in my judgment, elucidates the competitive implications of the proposed transaction, in light both of my own professional experience in evaluating the competitive consequences of acquisitions and of the theories of competitive harm that the plaintiff in this action, in its complaint and subsequent filings, appears to assert. In particular, I have reviewed an extensive body of economic and descriptive studies concerning the history, present structure, and performance of the beef industry, including the specific aspects of the industry—the procurement of cattle and the sale of beef products and by-products—which this case concerns. I have discussed these matters extensively with respected agricultural economists and agricultural scientists at various universities, as well as agricultural economists employed by the United States Department of Agriculture. I also have discussed with Excel officers and employees relevant aspects of Excel's own operations, including procurement patterns and practices, slaughter and fabricated beef operations, and sales and marketing of beef and beef by-products. I believe that the information that I have gathered is reliable and, tested against the knowledge of economic principles and of the determinants of competitive behavior I have gained in the course of my professional training and practice, and allows me to form a soundly-based professional judgment on the likely competitive consequences of the acquisition.

1.3 Based on this study and investigation, I believe that Excel's acquisition of Spencer Beef is unlikely, in the reasonably near future or in the longer term to affect competition adversely, either in the purchase of fed cattle or in the sale of beef products. This general conclusion rests on the following principal points:

a. Like most economists experienced in the analysis of the competitive consequences of acquisitions, I believe that, except in situations involving near monopoly market shares or market positions, an acquisition is likely to have a sig-

nificant adverse effect on competitive market performance only if the increase in concentration the acquisition causes substantially contributes to the ability of market participants to cooperate to increase prices (and reduce output) of the products they sell, or to decrease the prices (and decrease the amount) of the products they buy. I believe that, to assess the likelihood of this effect, it is necessary to consider not only concentration statistics, but also entry conditions and other market characteristics that constrain anti-competitive cooperative behavior among market participants. I believe that the steps in the analysis of an acquisition's competitive effects, including market definitions, share calculations and analyses, and consideration of other determinants of market performance, should be focussed on the basic question of the acquisition's contribution to the likelihood of cooperative behavior.

b. Accordingly, I believe that, in defining relevant product and geographic markets, it is necessary to consider all of the demand and supply factors that substantially constrain the acquiring and the acquired firms and the firms with which they directly compete in their ability cooperatively to raise the prices of their products, or to reduce the prices they pay to their suppliers. Applying this principle in this case, I conclude that, with respect to sales of boxed beef, the product market relevant to competitive analysis of the acquisition is, at minimum, all fabricated beef from fed cattle, non-fed cattle, cows and bulls, including beef fabricated by firms not integrated with packing facilities. I further conclude that, considering longer term substitution effects, the relevant market properly should include carcass as well as fabricated beef. I agree with the view apparently shared by all parties to this case that the geographic market for beef products is national in scope. With respect to the procurement market for fed cattle, I agree with Professor Stout's conclusion that the geographic market is probably national in scope, but that it includes, at minimum, all purchasers east of the Rocky

Mountains. In calculating market share statistics, I conclude that it is necessary to include the capacities of slaughter firms that do not now purchase fed cattle, or do so only for part of their slaughter, since those firms could switch to the slaughter of fed cattle in sufficient amounts to constrain any effort by present fed cattle purchasers to depress fed cattle prices.

c. Based on these market definitions, my associate, Mr. William Burnett, has calculated market share statistics employing various assumptions and universes. The calculations were conservatively made, to assure that, if anything, they overstated the acquisition's effects on concentration levels. In my professional judgment the data on which the calculations were made have been carefully verified, and provide a reliable statistical basis on which to assess market concentration levels and the concentration increase the acquisition would cause.

d. I conclude that, with respect both to sales of beef products (including boxed beef) and to procurement of cattle (including fed cattle), the present levels of concentration in the markets and the levels of concentration resulting from the acquisition are not sufficiently high to support a sound economic judgment that the acquisition is likely adversely to affect the markets' competitive performance. Any such judgment, I believe, can responsibly be based only on careful review and analysis of all market characteristics that affect the ability of firms in the markets cooperatively to raise the prices of their products, or to depress the prices they pay for cattle.

e. As an economist, I believe that the most important constraint on cooperative anti-competitive behavior is the likelihood that firms would enter the market, or existing, small firms would substantially increase their productive capacity, were the market leaders to attempt cooperatively to raise product prices or reduce input prices and thus increase their profitability. I conclude that no economically

significant obstacle would impede relatively rapid entry (or expansion of existing production) into either cattle slaughter or beef fabrication, and that the likelihood of such entry or expansion would very substantially constrain any cooperative anti-competitive effort.

f. These markets show characteristics in addition to ease of entry that in my judgment strongly constrain anti-competitive behavior and should continue to do so even at higher levels of concentration than those that would result from the acquisition. Complex buying and selling patterns, relatively large-scale buyers, wide variations in firm and plant cost functions, price elasticity and cyclicality in cattle supplies, poor storability of both cattle and fresh beef products, and substantial shifts in demand due to prices and supplies of other meats—make it, in my judgment extremely difficult, if not impossible, for firms in the markets to coordinate their price and output decisions, even by express cartel-like agreements and certainly by tacit cooperation.

g. The trend toward larger and more efficient slaughter and fabrication plants, the trend toward multi-plant firms, and the consequent trend toward increased market concentration does not, in my professional judgment, give cause for concern about this acquisition or the future competitiveness of the industry. These trends, I believe, are the consequence of a diffusion of technology in a highly competitive market environment. Entry conditions and other market characteristics persuade me that even if the trends were to continue, the markets, in all probability, would continue to perform competitively. Furthermore, predictions of market trends infrequently cannot be made with any strong confidence in their accuracy. Technological developments, new supply methods, shifts in demand and other factors can cause dramatic and unanticipated changes even in what appear to be very stable market patterns and trends.

h. The conclusions summarized above are derived from the usual and accepted economic analysis of a horizontal acquisition's competitive consequences. I have also attempted to analyze the theory of competitive harm that the plaintiff in this action seems, as I understand it, to advance. It is theoretically possible for market leaders with very high market shares substantially to increase their productive capacities, correspondingly to increase their demand for (and hence the price of) inputs, and to decrease their prices for products, thus reducing profit margins for all market participants and possibly driving some from the market. The conditions in the relevant markets here, however, do not, I believe, make such a strategy at all likely in any way to affect the markets' competitive performance. In particular, once the strategy had "succeeded," failure of surviving participants to perform competitively would lead rapidly to reintroduction of some old capacity and introduction of new. This and other factors lead me to believe that the expansions the plaintiff predicts are competitive efforts rather than predatory strategies either designed or likely to secure market power.

BACKGROUND AND EXPERIENCE

2.1 Since I have been with Glassman-Oliver I have analyzed a variety of antitrust issues not only in the context of mergers, but also in such areas as monopolization, exclusive dealing, territorial restrictions, resale price maintenance and other areas. My competitive analyses of mergers and other business practices have concerned a wide variety of producer goods and consumer goods industries, including natural gas, automotive parts, cement, beer, wine, furniture and motion pictures. I was selected by the Federal Trade Commission as the sole outside reviewer of their report, *Mergers in the Petroleum Industry*, published in September, 1982. While at Glassman-Oliver I was hired by the Federal Trade Commission to examine market definition and other issues in a significant hori-

zontal merger case in which the Commission sought a preliminary injunction.

2.2 In 1965 I received my B.A. degree with distinction in Economics from Carleton College in Northfield, Minnesota. In 1970 I received a Ph.D. in Economics from the University of Wisconsin at Madison, having passed my preliminary examinations for the Ph.D. with distinction in both economic theory and industrial organization. My major Ph.D. field of study was industrial organization, the branch of economics dealing with relationships between market structure and behavior, and their effects on the economic performance of industries. My other principal field was econometrics, the branch of economics dealing with the statistical testing of economic hypotheses and the estimation of relationships among economic variables. I studied with leading authorities in each of these fields: Professor Leonard W. Weiss in industrial organization and Professor Arthur S. Goldberger in econometrics. My Ph.D. thesis, "Interindustry Relations and the Impact of Monopoly," examined the effects of noncompetitive pricing on the economic welfare of consumers.

2.3 From mid-1980 until I joined Glassman-Oliver I served as Director, Office of Conservation, Policy and Evaluation, U.S. Department of Energy. In that position I was responsible for directing analysis of federal energy conservation policies, including evaluation of the effects of changing energy costs and supplies on a large number of industries.

2.4 From mid-1977 until just before joining the Department of Energy I served as Assistant Director for Economic Evidence, U.S. Federal Trade Commission. In that position I was the principal economic advisor to the Commission on antitrust issues, including the economic effects of horizontal and other mergers, and supervised a staff of more than 40 professional economists.

2.5 From 1976 through mid-1977 I was Staff Economist for Regulatory Reform, U.S. Senate Governmental Affairs Committee. In that position, I was responsible for writing a committee report on the economic effects of regulation. From 1974 until 1976 I was Senior Research Associate at Charles River Associates, a private economic consulting firm in Cambridge, Massachusetts. At Charles River Associates I performed economic studies including analyses of numerous antitrust and competitive issues.

2.6 From 1969 through 1974 I was Assistant Professor of Economics at the University of Michigan at Ann Arbor, where I taught graduate and undergraduate courses in industrial organization, econometrics and economic theory, and was responsible for supervising the research of both graduate and undergraduate students. From 1968 through 1969 I was a Lecturer in that Department. From 1971 through mid-1974 I served as a Research Associate, Bureau of Hospital Administration at the University of Michigan's School of Public Health. While attending graduate school at the University of Wisconsin, I was a Project Assistant in Economics from 1966 to 1967 and a Teaching Assistant in Economics from 1965 to 1966.

Economic Principles for Analysis of the Competitive Effects of the Acquisition.

3.1 As an economist experienced in the analysis of market structure and performance, my primary concern in evaluating a horizontal merger or acquisition is to determine whether it is likely to cause a significant increase in the probability that the firms participating in the relevant market or markets will be able to move away from vigorous, independent competition toward monopoly-like, cooperative, tacitly collusive, or cartel-like behavior. Leading, respected authorities in the fields of industrial organization and antitrust economics agree that, short of transactions involving or resulting in monopoly-like market positions of single firms, a horizontal merger should be evaluated

in terms of whether it substantially raises the likelihood that firms will be able to exercise market power through anticompetitive cooperation or tacit collusion (recognition of interdependence in pricing and output). The 1982 Merger Guidelines of the Department of Justice and the 1982 Policy Statement on Horizontal Mergers of the Federal Trade Commission reflect, correctly in my view, this focus on the effect mergers may have on the probability of collusion among firms, whether tacit or express.

3.2 Economically sound evaluation of the competitive implications of a horizontal acquisition focuses on substantial increases in the probability of such anticompetitive cooperation because, unless it has a monopoly-like market position in a relevant market, it is generally not possible for a single firm profitably to restrict output or raise prices, or to depress prices and restrict purchases of inputs, to any significant degree without some form of anticompetitive cooperation or at least acquiescence from its rivals in the market. This emphasis on the necessity of collusion or tacit cooperation among sellers or buyers in order to achieve market power is based on past work by respected authorities in the field, including Nobel Laureate Professor George J. Stigler, whose classic paper "A Theory of Oligopoly" clearly reflects this view. G. Stigler, *A Theory of Oligopoly*, 72 Journal of Political Economy 46-61 (February, 1964, reprinted in G. Stigler, *The Organization of Industry*, 39-63 (1968) (Def. Exh. AAAAAA).

3.3 In my view, all major aspects of the economic analysis of the competitive effects of a horizontal merger, other than a merger involving near monopoly market shares, should be specifically designed to answer the primary question of the merger's effects on the ability of firms to engage in cooperation which will probably harm the industry's competitive performance. These specially designed analyses should address the relevant product and geographic markets, the measurement and interpretation of market share and concentration figures and trends, entry

conditions and the actual experience of entry and expansion, and other market and industrial conditions affecting the likelihood that the transaction may result in harm to competitive performance.

3.4 In my view, the task of an economist assessing a merger is to determine, using economic logic and available facts, the most likely competitive effects of the transaction, not merely to enumerate speculative possibilities. The achievements of economics in forecasting the future of individual industries have been modest. To the extent that competitive assessments rely on projections or extrapolations, it is important to consider the implications of all major causal factors operating in the market or markets, and to examine a range of alternative assumptions.

Economic Concern with Tacit Collusion or Cooperation in Selling and Buying: Oligopoly and Oligopsony Power

3.5 Potential economic concern with a horizontal merger is based principally on the possibility that the resulting (pro forma) increases in concentration and market shares may so substantially increase the ease of (or reduce the obstacles to) cooperation that sellers in the market might be able profitably and persistently to raise prices significantly above (and restrict output below) competitively appropriate levels, without being substantially constrained by new or expanded competition or other factors. Similarly, in considering the buying side of relevant markets, the principal potential economic concern with a horizontal merger is based on the possibility that the resulting (pro forma) increases in market share and/or concentration might so substantially increase the ease of (or reduce the obstacles to) cooperation that buyers in the market might be able profitably and persistently to depress input (or "procurement") prices below (while restricting purchases below) competitively appropriate levels, without being constrained by new or expended [sic] competition or by other market forces.

3.6 In economic parlance, the market power that might be gained or exercised by firms cooperating on the buying side is termed "oligopsony power," a term clearly related to the term *oligopoly* (*few sellers*) and monopsony (one *buyer*). Monopsony is the buying side analogue to monopoly, and denotes a situation in which one buyer, acting alone and without cooperation from others, can profitably restrict purchases of and lower the prices paid for an input; it might be termed "monopoly on the buying side." Such purchase-restricting and price-reducing effects are the focus of virtually all economic writings on buying-side market power. In economic analysis, monopsony power is fundamentally based on immobility of inputs—their inability practically to reach alternative purchasers. Similarly, oligopsony power is fundamentally based both on cooperation (or anticompetitively recognized interdependence) among buyers *and* severe input or resource specialization or immobility. Scherer, *Industrial Market Structure and Economic Performance*, at 297-313 (2d ed. 1980) (Def. Exh. XXXXXX). Thus, these concepts of buying side market power must, in practice, rest on the same types of foundations as selling side monopoly power (absence of close substitutes or competitors) and oligopoly power (absence of close substitutes and cooperation among rivals).

3.7 Relatively few analyses of industrial markets have associated significant competitive problems with buying-side concentration. F.M. Scherer, *Industrial Market Structure and Economic Performance*, *supra* at 297-313 (Def. Exh. XXXXXX). In economic analysis, monopsony has been most frequently discussed and analyzed in relation to areas in which certain specialized workers have no or few alternative employment opportunities. The few empirical economic analyses of monopsony and oligopsony outside of labor economics generally emphasize quite specialized or immobile resources, for example, the possible monopsony power of certain natural gas pipelines *vis-a-vis* gas producers facing few, if any, alternatives for moving their

products to consumers. P. MacAvoy, *Price Formation in Natural Gas Fields* (1962).

3.8 While it is logically *possible* that buying-side market power might be utilized to *raise* input prices, possibly to disadvantage rivals, the conditions under which such actions are likely or might conceivably be profitable are highly complex, untested, and, as discussed below (¶ 7.0, *infra*), do not apply in the circumstances of this matter. The few analyses of such price-raising are of assumed buying-side monopoly power and do not apply to analysis of this merger. One such analysis considered collusion or cooperation among coal mining companies and labor unions to raise wages. Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case*, 85 Quarterly Journal of Economics 85-116 (Feb. 1968). Another published analysis is purely hypothetical or theoretical, and examines the behavior of a near monopolist facing only very small rivals, and so is not directly relevant to this transaction. Salop and Scheffman, *Raising Rivals' Costs*, 73 American Economic Review 267-271 (May 1983).

3.9 Notwithstanding the fact that the overwhelming majority of economic assessments of competition have focused on questions related to selling-side market power, there are substantial symmetries between the economic determinants of the potential competitive effects of horizontal merger between sellers and the determinants of the effects of a horizontal merger between buyers. Put generally, the key economic questions are: "Is the industrial environment one which is favorable to long-lived anticompetitive cooperation? Would such cooperation, if it occurred, substantially reduce output, raise prices or in some other way worsen competitive performance?" Economists recognize that such cooperation is often difficult to achieve and maintain, and that these difficulties compound in industries with complex, changing or uncertain market environments. Economists also recognize that sustained anticompetitive cooperation generally requires firms to compromise or

partly ignore their own immediate profit interests and incentives. As Professor Stigler notes, "It is a well-established proposition that if any member of the agreement can secretly violate it, he will gain larger profits than by conforming to it." G. Stigler, *A Theory of Oligopoly, supra* at 42 (Def. Exh. AAAAAA). Were cooperation initially to raise price above what it would otherwise have been or to create expectations of so doing, each seller would be delighted, but would also wish to sell more at that higher price. If sellers give in to this desire, their increased output will cause prices to fall. Similar mechanisms restrain buying-side cooperation.

3.10 In many situations horizontal mergers may allow the realization of efficiencies or the better utilization of existing assets and capabilities. In reasonably competitive market environments, benefits from such efficiencies are passed on to customers. In addition the achievement of efficiencies by one firm is generally a competitive stimulus to others. Economists' understanding of the relationships among efficiencies, firm size, market shares and concentration has also improved, as many economists have emphasized that industries with few firms are frequently vigorously competitive, and that a firm's improved efficiency will tend to increase its market share as well as its profitability. Scherer, *Industrial Market Structure and Economic Performance, supra* at 280-294, (Def. Exh. XXXXX); Pautler, *A Review of the Economic Basis for Broad-Based Horizontal Merger Policy,* Federal Trade Commission (Oct. 1981) (Def. Exh. UUUUU).

3.11 In my view, which I believe is shared by most economists experienced in the analysis of competition, these findings imply that only those horizontal mergers which bring about a substantial probability of enduring and effective cooperation among firms, whether in buying inputs or selling their products, give rise to competitive concern. Prevention of horizontal mergers where this probability does not strongly appear would risk significant losses of

efficiency and could impair vigorous competition on the merits.

Principles for Delineation of Economically Relevant Product Markets

Line of Commerce or Product Market

4.1 Likely effects of acquisitions or mergers are generally analyzed within the framework of a line of commerce or product market. The definition of a product market within which to assess effects must be related to the types of competitive effects which are of potential concern. The principles discussed below are generally stated in terms of potential concerns with possible "selling-side" oligopoly or market power. The same principles apply to market definition.

4.2 As an economist, I believe that, in determining an economically relevant market for the purpose of assessing a horizontal merger's competitive affects, the principal question is: "What are the alternative sources of supply to which various groups of buyers of a product could reasonably turn were price of the product to rise?" An economically relevant product market must therefore consider products to which consumers or users could turn in order to satisfy their needs or demands for a particular set of functions or services, and the various firms that do or could produce such products. Thus, any product market determination must examine both demand and production (or supply) flexibility. Alternatives can become available either as users shift to different products or as producers move from one product to another. Either form of substitution can have the same competitive effect in terms of making alternatives available to users. The same principles apply to analysis of a merger between buyers of the same product or products.

4.3 The demand aspect of determining the boundaries of a relevant product market is approached by examining the ease with which users of one particular product could shift to others were the product's price to rise or its availability to decrease, other factors remaining the same. If two products are reasonably close substitutes in demand, any price increase of one of them will tend to be constrained by shifts of demand to the other product. Therefore, even two products which are physically or otherwise different should be included in the market if they are close enough substitutes in demand that significant changes in relative price induce substantial shifts in demand. Such products should be included in the same relevant product market because they directly compete. This test must be applied with care, for a variety of other factors (such as changes in income) may cause available data to fail to reflect underlying shifts. The relevant question is not whether one in fact observes a substantial change in any particular set of data but, rather, whether there is a significant enough interaction that demand for the proposed substitute product is substantially higher and demand for the product whose price is hypothesized to have risen is substantially lower *than it would otherwise have been.*

4.4 Similarly, the supply side aspect of product market definition is approached by examining production flexibility or the extent to which an increase in the price of one product would induce producers of other products to realign their production to begin producing either the product itself or close substitutes for it. If two products are reasonably close substitutes in supply, so that producers of one can readily realign their production facilities to supply the other, then an increase in the price of the latter product will tend to be constrained by producer movements to increase its supply. Two products that are close substitutes in supply thus should be included in the same relevant product market, because the capacities and capabilities of producers of one of the products represent

alternative sources of supply to present users of the other. In such cases, the producers of the two products compete. The same principles apply to market definition for purposes of assessing mergers between buyers.

4.5 Based on the accepted economic principles discussed above, when two products are reasonably close substitutes in either demand or supply, they compete and an increase in the price of one of them will tend to be constrained by the availability of the other product, or by a shift in production from the other product to the product that has increased in price. Therefore, either substantial demand side or supply side flexibility between two products or groups of products is sufficient to require that they be included in the same product market.

4.6 Economists agree that if products are in the same market, their prices will in general move together. However, as with the demand or consumption shift test discussed above, the analytical tool must be applied with extreme care. Any particular set of price data often may fail to indicate a relationship, due to changes in other factors. In addition, two products may be in the same market, yet their prices may not move closely together. For example, if the supply of one of the products can be expanded rapidly, an increase in the price of the other product may produce little detectible contemporaneous movement in the first product's price.

4.7 Inclusion of products in the same market does not require that all or most consumers or producers (or capacity) of one must be able to shift entirely to purchasing or producing the other. Rather, a competitively significant number of consumers and/or producers must be able to shift in response to a moderate but sustained price increase. The exact number or proportion required for inclusion in a market cannot be specified or measured *a priori*. Rather, the competitively significant number is one sufficient to constrain substantially (render unprofitable)

any attempt anticompetitively to cooperate and raise prices. The same analysis applies to market definition for purposes of analyzing possible exercise of oligopsony power by buyers.

Product Market Definition: Beef Sales

5.0 Based on these principles and on my understanding of the facts in this case, I conclude that, with respect to the selling side of this case, the narrowest, plausible relevant product market within which to evaluate the likely competitive consequences of the acquisition of Spencer Beef by Excel Corporation is the sale of all fabricated beef into all wholesale and retail channels, including sales to hotels, restaurants and institutions. This market concept includes all sales of boxed, fabricated or ground beef except that sold in "carcass" form (whole, half, or quarter carcass) to individual supermarkets, etc. Thus, this market includes what is sometimes termed "packer" boxed beef, both vacuum packed and not; boxed beef from fed and non-fed steers and heifers; other beef from fed steers and heifers, including ground beef, and portion control cuts; boxed and unboxed non-carcass beef, from cows and bulls; and imported beef. The definition includes beef that is fabricated (*i.e.*, reduced to pieces below "carcass" size) in central or other breaking facilities of wholesalers, retail supermarket chains, and such institutions as restaurants and hotel chains.

5.1 This narrowest plausible market excludes sales of carcasses to individual retail outlets because, both in the short term and, in some cases, over the longer term, many such individual outlets may face some obstacles in economically and rapidly switching to carcass forms of beef, were the prices of fabricated beef products assumed to rise; that is, individual retail outlets may in some cases be such inefficient producers of fabrication services that, were the price of such services to rise, such outlets might be unable or unwilling to reduce their purchases of fabricated beef substantially. According to conversations with Mr. Donald Meiergerd, Excel's boxed beef pricing executive, Mr. David Neubauer, and others, this inability in some cases economically to shift appears to arise (at least in the short run) from the fact that "rails" and other equipment for handling carcass beef have been removed from individual stores, from short term difficulties in hiring additional butchers and installing equipment, from lack of space in stores and other facilities, and from the frequent high cost of "fabrication" on such a small scale.

5.2 As an economist, however, I believe it is clear that the factors that may justify exclusion of carcass sales to individual retail outlets are not insurmountable, nor do they operate in all cases. For example, in his deposition, Mr. Meiergerd noted that the ability to "custom cut" to purchaser specification led some outlets to prefer to do some "fabrication" in the "back room" of the store. (Meiergerd Dep. 73:7). Thus, abandonment of fabrication cannot be an unmitigated advantage to all retailers; some would undoubtedly shift back to carcass purchases were the prices of fabricated products persistently and significantly to rise. Both demand and supply side factors imply that the most plausible relevant market for appraising possible selling side effects is probably broader, including all beef sold into wholesale channels, whether in carcass form or not. In any case, although the exact magnitude of the difference between these two market concepts cannot be quantified with any degree of precision, it is clear to me that the difference is too small to be of significance for the evaluation of the possible competitive effects of this acquisition.

5.3 All types of beef—boxed, fed and non-fed, carcass, ground, and imported—compete to a significant degree for ultimate consumer demand and for the demands of many wholesale customers. As a result, my judgment as an economist is that there are serious weaknesses in any product market definition substantially narrower than "all beef"

(including the "all fabricated beef" market noted above). Thus, it is my opinion, based both on facts and economic logic, that a wide range of narrower market definitions which have been proposed in this matter must be rejected.

5.4 Market definitions that exclude beef fabricated by "captive" operations of supermarket chains and others appear to have no basis in either fact or economic logic. Presumably the supermarket chains and other firms fabricating some or all of their own beef are generally in competition with operations buying "commercially fabricated" beef from other firms. If the price of such "commercial"products were to drop, some of the users of "captively fabricated" beef would increase their rates of operation and, in the long term, increase their capacities. As Mr. Neubauer informed me in our discussions, and as his Declaration indicates, it is generally quite inexpensive rapidly to add hours or shifts to existing capacity for fabrication. There has been a trend away from such internal fabrication, but Safeway, Winn Dixie, Kroger, King Soopers and other firms maintain substantial fabrication capacity. All of these operations buy beef on the market, in addition to the beef they produce in their "captive" plants; such users presumably vary their use of "captive" and "market" supplies based on rational analysis of costs. The captive and purchased beef products are essentially identical in the eyes of consumers. Indeed, the very trend toward commercial fabrication indicates to me that there is competition between "captive" fabrication and outside purchases; were there little or no competition, captive fabricators would have had little or no incentive to switch. Even where no single captive user is able to vary its purchases or production in response to price incentives, were the price of commercially-fabricated beef to rise, those outlets using such beef in relatively high proportion would suffer losses in sales to those with "captive" sources. Both "captive" and commercial fabrication satisfy market demand, so they are in competition and are in the same

market. In my view the Merger Guidelines of the Department of Justice correctly take the view that captive production must be included in relevant markets.

5.5 For similar reasons, the market cannot be limited to "packer boxed beef"—that portion of so-called boxed beef produced and sold by packers who are also slaughterers. Others' products are often either essentially identical or equivalent to the product sold by slaughtering packers and are available from non-integrated fabricators, urban and other "breakers" and others. Indeed, as Mr. Neubauer has informed me, some customers apparently find the products of certain such suppliers better suited to their needs than the products of Excel or other major suppliers. This is entirely plausible considering the various cost and flexibility advantages that appear to be enjoyed by some smaller sellers of beef products.

5.6 It is my opinion that the plaintiff's focus on certain narrow market definitions (*e.g.*, packer-boxed beef, fabricated beef excluding captive, vacuum-packed primal and subprimal cuts, and boxed beef from fed steers and heifers) may represent a misapplication of economic logic. To be sure, in recent years there have been marked trends toward the fabrication of beef into primal and subprimal cuts, vacuum packing, integration of slaughter and fabrication within the same firm, and away from captive fabrication. That these trends exist at present does not mean to me, as an economist, that product market definitions can properly be based on them, or on their extrapolation into the future. The trends are based on shifts in costs, prices, and demands for various products; anti-competitive price escalation in any of the narrower product markets proferred would likely, in my judgment, change the balance of factors driving these trends to a significant degree. The rapid trend toward packer-boxed beef is more indicative of the competitive pricing of such products and the rapid diffusion of technological innovation than of a lack of demand or supply substitutability. In his deposition, Mr.

Monfort appeared to understand this fact of competition and competitive pricing, noting that IBP, Excel and others had gained due to the cost and performance advantages of their product.

5.7 Both demand and supply-side flexibility indicate that beef from non-fed cattle must be included in the relevant product market for assessing the selling side effects of this acquisition. Since most imported beef is from non-fed origin or non-fed animals, imported beef must also be included as part of the market. On the demand side, as Professor Stout will testify, it appears that as prices of fed beef have risen, consumers have tended to maintain overall beef consumption (or decrease it relatively slowly) while shifting from fed to non-fed cuts, in part by shifting to ground beef and "rediscovering" uses for cheaper cuts. Ward and Bullock note that 80% lean ground beef is a direct substitute for such cuts as steaks and roasts. (Ward and Bullock, *Relationship Between Structure and Performance in the Steer and Heifer Slaughtering Industry—Review and Comments* at 8–9, (Def. Exh. FFFFF). Much ground beef is cow meat and most cows are not fed. Although estimates differ, ground beef constitutes a substantial proportion of total beef consumption, perhaps as much as 30 or more percent. Demand flexibility between ground beef and "block" or solid beef cuts such as steaks and roasts, thus implies that cow beef, which constitutes a major proportion of total domestic beef production—20.5% of 1982 commercial slaughter, and over 17% during the years 1973–1982, must also be included in the relevant market. Table K-5, Def. Exh. BBBBBBB.

5.8 Bull meat too is used in ground beef as well as processed foods and other uses; cow meat is used in these uses as well. Although bull slaughter accounted for less than 3 percent of total domestic slaughter in recent years, the flexibility in demand between bull and cow meat, as well as the flexibility of plants to shift between the slaughter of them, implies that this meat should be included in

the relevant product market. Table K-5, Def. Exh. BBBBBBB.

5.9 Demand-side flexibility also comes from direct and indirect competition between solid cuts of meat from fed and non-fed cattle, both cows and steers and heifers. Certain cuts from such animals, notably the loins and portions of the ribs, are often sold as such to both restaurants and other institutions and to grocery stores. In restaurant use, such meat competes with at-home consumption, including the consumption of cuts of meat made from fed boxed beef, as well as ground beef and other meats. In retail sales, such meat provides lower cost alternatives to meat from fed cattle and so competes directly. It is not necessary that all or even many consumers be willing directly to shift from the consumption of fed to non-fed meat. Rather, some of the competitive constraint from the supplies of unfed meat (including imports) comes as certain consumers shift to other products in response to a hypothesized price increase for fed beef. This frees up available supplies of fed beef for other consumers. As a result of this chain of substitutions, the non-fed products provide a substitution alternative for the market as a whole.

5.10 Substantial supply flexibility between fed and non-fed beef indicates to me, as an economist, that the two types of products should be included in the same relevant product market. First, as Mr. Neubauer's Declaration describes, and as he has discussed with me in our extensive conversations, most well-designed plants can slaughter cows, bulls, and fed cattle. Mark Smith of Excel has told me, and will, I understand, testify, that on certain days of the week some Excel plants slaughter cows. According to Mr. Neubauer, no technological obstacles prevent such switching, and the change can be accomplished at a minimal cost. Indeed, certain plants, including some of IBP's, fabricate the entirety of each animal on one "table" or line as opposed to having a separate table for, *i.e.*, ribs, round, loins, and other parts. In some cases, the plant

might simultaneously process cows, bulls, steers and heifers. These and other plants can shift rapidly among types and grades of animals. Given this ability to switch, supply-side factors dictate that meat from these animals is properly included in the relevant product market.

5.11 Studies of the effects of imports on beef markets and prices indicate that increased imports of beef depress the prices of all beef, fed and non-fed, with larger immediate effects on the non-fed variety. (J.W. Freebairn and Gordon C. Rausser, *Effects of Changes in the Level of U.S. Beef Imports.*)

RELEVANT GEOGRAPHIC MARKET FOR BEEF PRODUCTS

6.1 I understand there is no dispute concerning relevant geographic market for the sale of beef products, and for purposes of this analysis I accept the assumption that the market is national in scope.

MARKET SHARES AND CONCENTRATION

7.1 The economic purpose of measuring market shares and concentration is to assess the ease with which firms in the market might act cooperatively to raise prices and restrict output or otherwise to coordinate their behavior anti-competitively.

7.2 There is no one unique or best measure of market share or concentration for the purpose of measuring the potential for anti-competitive effects. Since the purpose of such measurements is to assess the potential for control of supply, in an industry such as beef where many plants can readily raise their production when circumstances warrant, the use of capacity is, in my view, particularly helpful. To be sure, estimates of capacity can differ, but in my judgment careful review of available information can yield reasonably accurate results. I have discussed Mr. Burnett's investigations of capacity with him from the time

he began work on this project and consider that his assessments of the capacity figures, detailed in his declaration, are reasonable.

7.3 The fact that firms may be of different sizes, efficiencies, or degrees of vertical integration does not weaken or lessen the usefulness of market share concentration figures based on capacity as compared with those based on, *e.g.*, present production. A firm may have relatively high current sales or production and yet have weak long-term prospects. Similarly, a firm may have relatively low capacity but very substantial prospects for future expansion and competitive vigor.

7.4 It is not possible precisely to measure the size of the market universe for "all fabricated beef sales" discussed above. However, it is clear from my discussions with Excel officials and review of available information that the overwhelming majority of the cattle slaughtered in the country move to wholesale and retail channels as some form of fabricated products, notwithstanding the fact that slaughterers sell a significant proportion of their kill as carcass beef. Thus, total slaughter of cattle in the country is a reasonable universe for the measurement of market shares, although, in my view, an even more accurate universe would include imports.

7.5 In conducting my assessment of the competitive effects of this acquisition, I asked Mr. Burnett to construct tables measuring or estimating market shares and concentration indices (four-firm concentration shares, eight-firm concentration shares, and HHI indices, both pre- and post-merger) based on a range of assumptions concerning the appropriate universe and the appropriate measure of a firm's contribution to that universe. Table C to Mr. Burnett's declaration represents the most conservative calculations made. In that exhibit, the market universe is limited to the total of the fabrication plant capacity estimates that resulted from Mr. Burnett's analysis and cal-

culations. Thus, only the capacities of the firms included in the study are in the universe, and it is clear, and known to us from the designers of the study, that substantial numbers of relatively small fabricators were omitted. Mr. Burnett's Table E, which uses total 1982 U.S. cattle slaughter to estimate a universe for the slaughter/production of meat represents a less conservative approach, but one which still tends to overstate likely levels of market share and concentration and changes therein due to the merger. Table D of Mr. Burnett's declaration, which presents market share and concentration estimates based on recently obtained estimates or data on actual 1982 slaughter of the leading firms, demonstrates the conservatism of the approach taken. The maximum HHI index in Table D (which in turn is based on an assumption that the firms below the top five are substantially larger than in fact they are) is over sixty points below that obtained in Table E—a slaughter capacity-based table. Finally, Tables F and G to Mr. Burnett's declaration include imports in the market universe, which, given our analysis of the relevant product market, is appropriate. Again, the comparison of Table G (the slaughter capacity-based table) and Table F (with shares in concentration based on actual slaughter figures for the leading firms) indicates the conservatism of the approach taken.

7.6 Even in the most conservative market share and concentration analysis (Burnett Table C), the levels of four-firm, eight-firm, and HHI indices of concentration are not near the levels that most economists might consider competitively dangerous before the merger, nor would they rise after the acquisition above levels responsible economists consider dangerous. In the other, more realistic market share and concentration analyses, the concentration and market share levels and changes present even less cause for competitive concern. This is so even if the statistics were to be judged by the standards of the past, when the consensus among economists was stronger than

it is today that increases in levels of concentration and market share could be presumed to bring with them a substantial increase in the probability of anti-competitive coordination. In none of our analyses of concentration and market share does four-firm concentration rise above 50 percent, a level which, by standards enunciated in certain studies, has at times been considered to be the threshold "critical" level above which some economists believed there was ground for concern that the market might not perform competitively. Only in the analysis presented in Table C, which itself represents a very conservative approach, does four-firm concentration approach 50 percent. In the more realistic analyses represented by Tables D, E, F, and G, four-firm concentration is well below levels that might have been considered dangerous, even by standards of the past, even ignoring other factors that influence the likelihood of enduring anti-competitive cooperation.

7.7 As discussed previously, at present there is not a strong consensus of economists that increases in market shares or concentration can be taken as providing strong or, without consideration of other market conditions, even modestly convincing evidence of a likelihood of an increased probability of the exercise of oligopoly or oligopsony power. This is in large part due to increased understanding of the possible efficiency rationales for increased concentration or high levels of market shares. As of the late 1960's and into the 1970's, many industrial organization economists shared the belief that studies which statistically related profitability and concentration should be interpreted to show that higher concentration frequently or generally resulted in an anti-competitive worsening of economic performance. Thus, given the relatively small levels of concentration change it would involve, and considering the present state of economic knowledge and understanding concerning the effects of concentration, I believe that, unless other factors operating in the relevant market or markets are particularly conducive to anti-com-

petitive cooperation, the present merger presents no significant probability of substantially lessening competition or creating a tendency to anti-competitive economic performance.

7.8 Some recent economic studies stress not overall indices of concentration, but rather the market shares of the top few firms in the industry, notably the top two. One such analysis found a statistical increase in price-cost margins when two-firm concentration crossed a 35 percent threshold. Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 Review of Economics and Statistics at 101-09 (Feb. 1979). Even assuming the validity of this analysis as an indicator of the possibility of anticompetitive cooperation, the indicated share levels are approached only in the highly conservative and unrealistic Table C. Further, most responsible economists do not fully accept such analysis, which emphasize the shares of the leading firms and which, like other studies which statistically relate concentration to economic performance, are open to alternative interpretations. Even within the analytical frameworks that emphasize the shares of the two leadings firms—analyses that implicitly or explicitly are based on cooperation between the two leaders, it is in my view that the levels of market share concentration exhibited here and the changes in concentration caused by this transaction cannot be considered to suggest a significant probability of competitive harm, unless it appeared that other factors that are conditioning competitive performance are quite conducive to cooperation.

7.9 Additionally, all of the market share and concentration analyses reported are conservative in that they assume that the Schuyler plant of Spencer is operating, when in fact it is now shut down. Thus, the calculations in effect assume that there would be an immediate increase in pro forma market share based in part on a facility that has been shut down for some time. If, in fact, as some of the plaintiff's arguments seem to indicate, plant start-up times

and costs are very substantial, then it cannot be said that the market share and concentration increases portrayed in our tables represent realistic estimates of the (pro forma) effects of the acquisition on market structure. Thus, in the world that plaintiff describes of substantial barriers and long start-up times it would be necessary to assume lower near term (and perhaps longer term) concentration and market share changes.

THE PROCUREMENT OF CATTLE

8.1 Price depressing oligopsony power—cooperatively exercised monopsony power—is discussed as at least a theoretical possibility in the economic literature. Such price depressing cooperation appears to underlie the longer term method of competitive harm at the procurement level which the plaintiff appears to predict. Most of my analysis of the procurement side therefore proceeds in terms of the exercise of power to depress prices of cattle. The same principles apply to examination of possible exercise of power to *raise* procurement prices in order to injure rivals, although I assume that, were packers to pursue such a course, they would attempt, at some point, to reverse their course and shift to a more normal price depressing oligopsony strategy.

RELEVANT PRODUCT MARKET FOR ASSESSMENT OF POSSIBLE EFFECTS OF THE ACQUISITION ON CATTLE PROCUREMENT

8.2 The product market principles discussed above in connection with the selling side apply equally to definition of competitively-relevant product markets for assessing procurement side effects. Cattle, after all, are raised by ranchers, feeders and others for a profit, but beef cattle are not useful unless slaughter and processing services are made available. An alternative view of the procurement

relationship, which clearly shows the nature of the transaction and may be helpful in analyzing the true meaning of, and constraints on, the possible exercise of oligopsony power, is to consider the farmer or feeder, in effect, as "buying" slaughter or processing services from the meat packer. A decrease in the price that the packer is willing to offer for cattle of a given quality can be viewed as an *increase* in the price charged the farmer for the service of slaughter or processing. That is, following the assumed lowering of the price paid for the animal or animals, the farmer has less money than he would otherwise have had, just as if he had been charged for the slaughter services. Thus, the exercise of oligopsony power might be viewed as an attempt by meatpackers to exact a toll or a charge on the sellers of cattle. The economic questions then are: What are the alternatives to which the sellers of cattle (*i.e.*, the "buyers" of slaughter/processing services) can reasonably turn in order to satisfy their demand for these services? On the supply side, the economically relevant question is: Which suppliers of other types of services can practicably shift their resources or efforts into the supplying of cattle slaughtering or processing services? Just as in the analysis of product markets oriented to the selling side, the proper inquiry attempts to identify the alternative sources to which users of a service can turn in order to satisfy their demands and, on the supply side, the ability of firms to increase their supply of the relevant services.

8.3 Application of the economic principles of product market definition to cattle procurement indicates that the most plausible market in which to assess the possible competitive effects of this acquisition is the procurement of all cattle for slaughter. The relevant market, in my view, would consist of all those firms which are engaged in or could readily engage in, due to supply-side flexibility, the purchase of cattle for slaughter. Narrower product markets, such as the procurement of fed steers and heifers

for slaughter, ignore the substantial flexibility in operation of many, if not all, slaughter plants.

8.4 Many slaughter facilities now kill not only fed steers and heifers, but non-fed steers and heifers as well as cows, bulls, and stags. In 1982, 10,929,000 out of the 39,843,000 [sic] cattle commercially slaughtered in the United States were not fed steers and heifers. Def. Exh. BBBBBBB. Thus, substantial slaughtering capacity was devoted to cattle other than fed steers and heifers, much of it in facilities that now slaughter the full range of cattle or, if not, process a mix. For example, Mark Smith testified in his deposition that one of Excel's facilities slaughters cows on certain days of each week.

8.5 In my conversations and meetings with David Neubauer, and with Excel personnel, it was clear that many slaughtering facilities can economically handle a wide range of animals. Given that many facilities now handle not only fed steers and heifers, but also non-fed cattle, it seems clear that, were the price of fed steers and heifers to be depressed substantially and persistently by the concerted exercise of oligopsony power, many slaughterers would find it in their interest to shift their efforts away from the slaughter of cows and/or bulls, and towards the slaughter of fed steers and heifers. As with the definition of the relevant product market on the selling side, inclusion of non-fed steer and heifer slaughter capacity does not require that all packers with such capacity or indeed any particular packer would shift out of their present activities into the slaughter of fed cattle. Rather, what is required is that there be a substantial enough shift in the aggregate at reasonable enough cost that present slaughterers of fed steers and heifers would not find it profitable to engage in the restrictive behavior.

8.6 It might be argued that this shifting of slaughter capacity to fed steers and heifers would itself have effects that would cause the degree of shifting to be insubstantial.

Presumably, the argument would be that in response to and as a result of the initial shifting of resources or capacity away from the slaughter and processing of non-fed steers and heifers, the prices in, and returns to resources in, these areas would rise, thus cutting off the shift. However, this argument does not appear to apply in the circumstances of the beef industry. In this industry, as I understand Mr. Neubauer will testify, it is generally relatively easy to add hours or shifts to many existing plants, and the changes required in some cases (such as increased cooling and storage capacity) entail neither large investments nor long delays. At any time there is a substantial inventory of non-fed cattle of a wide range of varieties, including steers, heifers, and cows. Were the return to slaughter of such cattle to rise due to the shifting of capacity or resources away from their processing, additional numbers of these animals would profitably be slaughtered rather than, for example, entering the herd of beef cows, or being placed on feed. Thus, there is reason to believe that substantial supply or processing flexibility of plants as well as flexibility in the supply of cattle tend to broaden the market for procurement of cattle beyond current purchasers and slaughterers of fed steers and heifers.

8.7 The feeding of cattle involves, in most cases, substantial expenditures and delays in receipt of revenues. Were the prices received for fed cattle or fed steers and heifers to be depressed by oligopsonistic behavior or, indeed, were feeders of cattle to suspect that such an event or effect might occur, one predictable result would be that fewer cattle would be placed on feed and more would be range-fed or slaughtered as veal. Data on the placements of cattle and calves in feedlots indicate substantial variations from year to year; data on the feeder cattle inventory, also show quite substantial changes over time, undoubtedly in response to changes in actual and perceived profitability. Economic logic and reading of such standard publications as *USDA Livestock and Poultry Outlook and*

Situation indicate to me that decisions as to the number of cattle to feed and the duration of feeding programs, as well as decisions on how many cows to slaughter and how many to add to the breeder's stock are based on estimates as to future profitability. Thus, expectations of depressed prices due to monopsonistic or oligopsonistic behavior would tend to set in motion forces which would substantially constrain the possible exercise of such buying power.

8.8 Similar analyses indicate that such a market definition would apply equally to efforts to exercise market power in order to raise fed cattle prices. Were the present purchasers of fed steers and heifers to bid up their prices (*i.e.*, in a sense, lower the amount they charge for slaughter and processing services), the result would be an increase in the return to feeding cattle and increased offerings of cattle for slaughter, in part as the feeders of cattle shorten the feeding programs for their animals. Such effects would occur quite rapidly. Over the long term, the increase in the return to the raising of fed cattle would result in increased numbers being fed, requiring that the monopsonists or oligopsonists to purchase increasing numbers of fed cattle in order to sustain the higher price.

GEOGRAPHIC MARKET FOR CATTLE PROCUREMENT

9.1 In my view as an economist, the most important issue in delineating a competitively-relevant geographic market for assessing the procurement side effects of this transaction is to distinguish between so-called *normal procurement areas* and competitively-relevant markets. A normal procurement area is simply that—an area within which certain buyers typically buy. Presumably, the buyers restrict themselves to that area because it does not usually pay them to go farther. There may be two types of reason [sic] why it does not pay buyers to go farther than the distances encompassed by their "normal procurement areas." First,

there may be extremely high transportation costs or other economically insurmountable barriers to going larger distances. Second, the buyers of cattle may make most of their purchases near their plants because there is simply no reason to do otherwise. This would be the case even if transport costs were negligible, so long as cattle prices throughout a broader region differed by no more than the costs of transportation from point to point.

9.2 This tendency of prices for equivalent products may equal throughout a region (except for transportation costs broadly conceived) is a result that would be expected to occur on the average, and making due allowance for random fluctuations, in reasonably well-functioning, competitive markets. This proposition is basic to economics, in which the definition of a relevant geographic market area is the area over which prices tend to equality, due allowance being made for transportation costs. Thus, it is not proper to delineate a relevant geographic market area for the purchase (or sale) of cattle by referring to normal procurement areas. The relevant question is: To what purchasers, located in what geographic areas, *could* sellers of cattle reasonably turn were their customary purchasers significantly and persistently to lower the price paid to them for their cattle?

9.3 On this question, I am in broad agreement with Professor Stout, whose long experience in studying spatial pricing and shipments relationships in livestock markets, has made him aware of the important distinctions between normal procurement areas and relevant geographic market areas. Professor Stout and I agree that very long shipments of products may indicate a lack of spatial unification of a market, for, were prices to differ by no more than transport costs, long distance shipments might not be expected.

9.4 Shipment patterns are nonetheless of interest in delineating economically relevant geographic markets. When

there are significant and persistent shipments between geographic areas, it is unlikely that prices within the two areas can be independent; and, to the extent that the prices in the two areas in question are interdependent, the two areas tend to be unified as one economic market. Thus, were buyers in one of the hypothetical areas to act anti-competitively and depress the prices of cattle, this depression would be substantially constrained by movements of cattle to the other area.

9.5 The potential scope of a relevant geographic market for cattle procurement is in significant part determined by transportation costs, broadly conceived, in relation to the potential returns from shipping the product. There is no necessity for all of the sellers of cattle in a given geographic area to reach some other area in order for the two to be in the same relevant geographic market. The requirement is that, in response to an assumed significant and persistent depression in price in one of the areas or in part of one of the areas, enough of the sellers of cattle in that area would be able to reach purchasers in the second area substantially to constrain or limit the profitability of such a restriction in the first area. Thus, it is proper to measure potentially relevant economic shipping distances from the edges, rather than from the "centers" of so-called normal procurement areas.

9.6 In an exhaustive study, the Packers and Stockyards Administration of the United States Department of Agriculture has examined the question of geographic market delineation in cattle procurement. United States Department of Agriculture, Packers and Stockyards Administration, Industry Analysis Staff, *Geographic Markets and Prices for Fed Steers and Heifers*, P&SA Research Report No. 82-1, Def. Exh DDDDDD. Based on analyses of shipment patterns, price variations, and transportation costs, this study concluded that the *narrowest* economically plausible relevant geographic market for fed cattle procurement was an area encompassing the States of Nebraska

and South Dakota, the southwest corner of Minnesota, the western three-fifths of Iowa, the State of Kansas, the panhandles of Oklahoma and Texas, and certain areas in eastern Colorado and eastern New Mexico. I have discussed this study at length with three of its authors, and they agreed that the project was not designed to determine the *proper* scope of the geographic market for cattle procurement—that is, the largest area over which sellers of cattle might practically seek outlets for their animals in response to an attempt by purchasers in some area nearer to them substantially to depress the prices paid, but principally to determine whether relatively small, localized procurement markets make economic sense. The Packers and Stockyards study concluded that "efforts to relate market shares, market concentration ratios, or other structural characteristics of the market to competitive performance of the market should be directed at that geographic market (the area cited above) *or a larger geographic market* rather than at smaller geographic markets such as states, major or minor production/slaughter regions, and so forth. Id. at 39 (emphasis added).

9.7 The Packers and Stockyards study performed an extensive analysis of transportation costs of cattle. It estimated that in the high plains (Texas/Oklahoma Panhandle region), the average distance that cattle were shipped to cattle plants ranged from 48 miles to 150 miles, and that the extra cost of hauling hundredweight cattle an extra 100 miles beyond these average distances ranged from a low of about 7 cents to a high of about 32 cents with "a cost of near 20 cents being most common." Id. at 39. The study concluded, "Even the highest cost is small relative to cattle prices or relative to typical packer margins." This indicates that were fed cattle prices to be depressed in a local procurement area or indeed in the combined high plains—Nebraska/Iowa area (the broadest area the study examined), feeders and farmers would practically be able

to seek outlets at substantial distances beyond their normal procurement areas.

9.8 In principle at least, practical shipping distances for cattle could be limited by the tendency for bruising and other injuries to increase as the length of haul rose. The Packers and Stockyards Administration Study found no detectable increase in discounts for bruises or other carcass defects due to injuries with increasing haul distance. Id. at 39. This is consistent with information I obtained in conversations with Professor Harold Riley and Professor Weller of Michigan State University. Professor Weller, a professor of animal science, told me that a key factor in the transportation of cattle was to keep the cattle moving and to avoid large numbers of starts and stops, and that bruising and other injuries were infrequent when cattle were hauled in modern equipment by competent haulers. In addition, he indicated that under proper shipping conditions, which includes the avoidance of long distances of travel under hot sun, the majority of shrinkage of cattle occurs during the loading and the first few minutes and/or miles of the journey. Thereafter, shrinkage is generally modest. Both Professor Weller and Professor Stout indicated that the quality and ease of transportation of live cattle have increased over time as trucks and truckers have improved and become more experienced and as the highways have been improved with the development of the interstate highway system.

9.9 The geographic market area for cattle procurement is tied together by movements of feeder cattle, which are shipped very substantial distances. Professor Weller informed me that feeder cattle moved to Michigan from as far away as Florida and such cattle moved from the southeastern part of the country into Texas and California and from Montana and Wyoming down into the Corn Belt. Were purchasers of fed cattle in, for example, the 12-state region that the plaintiffs define as the relevant geographic market to act significantly to depress the price of

fed cattle, this would lower the return to bringing feeder cattle to the particular area. Some of these feeder cattle would then either be fed elsewhere, or not be fed but slaughtered unfed, thus increasing the supply of non-fed meat and putting downward competitive pressure on prices of fed beef.

9.10 Even if it were assumed hypothetically that fed cattle could not move outside of normal procurement areas, if the present purchasers of fed cattle in such an area attempted substantially and persistently to lower the price of such cattle, the effect would be that the number of feeder cattle delivered to that area would decline, as those cattle sought outlets elsewhere. The broad movements of feeder cattle throughout the country indicate that shipping costs are far from prohibitive and that substantial movements can be economical. Thus, even if fed cattle were highly immobile, feeder cattle movements would tend to render narrow geographic procurement markets economically irrelevant.

9.11 As a result of these considerations, the most plausible geographic market for procurement of cattle, considering adjustments both in the movements of fed and feeder cattle, is, at minimum, the area of the United States to the east of the Rockies. Considering the movements of feeder cattle from the western states into the Corn Belt, a broader area could very well be competitively relevant.

MARKET SHARES AND CONCENTRATION IN CATTLE PROCUREMENT

10.1 The purposes of market share and concentration measurement in procurement are essentially the same as in the analysis of potential selling side effects. Table A and Exhibit B to the Burnett Declaration (Def. Exh. UUUUUUU) portray the market share and concentration analyses. In the case of both the exhibits, the changes in concentration levels and market shares resulting from the

acquisition are far below the levels that, by present standards of economic analysis, might be considered dangerous to competition. In the case of market shares based on slaughter capacity, the postmerger combined share of the top two firms might appear to place the market at a "critical level" for combined shares of the leading two firms. However, as discussed above with respect to beef sales, on the present state of economic knowledge, it is not possible to make a prediction concerning competitive effects with any degree of confidence without examining other conditions operating in the market. "Critical levels" of concentration or market shares which are estimated statistically from data ranging across a wide range of industries must be applied with great care to any one market.

CONDITIONS GOVERNING ENTRY AND EXPANSION AND THE EXPERIENCE OF ENTRY AND EXPANSION

11.1 Economists agree that, without substantial barriers to entry there can be no enduring anti-competitive effects. New entry can erode even the power of a single firm monopolist. Both new entry and the competitive expansion of rivals in the industry can have even more dramatic effects in terms of destabilizing and rendering ineffective any attempts at the cooperation among firms necessary to exercise oligopoly or oligopsony power. As an economist, I believe that entry conditions and possible "barriers" to entry or expansion must be evaluated in relation to the competitive functions of entry and expansion. In situations where entry is difficult, it is possible for monopoly power or oligopoly or oligopsony power to survive. In situations where entry is easy, such market power cannot persist. The competitive function of entry or of the expansion of existing competitors is, in effect, to bid away or forestall the possibility of supernormal profits. Thus, since the competitive function of entry and expansion of existing firms

is to prevent the exercise of market power and to compete away or prevent the attainment of super-competitive profits, an economist should identify a barrier to entry as a situation or a phenomenon which prevents entry when it would be socially beneficial. Thus, a "barrier to entry" should not be defined merely as something that makes entry difficult. Entry may be difficult because the demands of customer and/or the technology are severe. This does not imply that incumbent firms can persistently restrict output and raise prices in order to enjoy excess profits. To say that any "impediment" to entry is a "barrier" that may allow persistent anticompetitive cooperation is to define a barrier to entry without reference to the economic and competitive function of entry. If a purported impediment to entry is a difficulty whiceee e eeh established firms had withto overcome as well, and if this overcoming of impediments entailed costs to these firms, it cannot be said that the so called impediment is a barrier to entry. Fisher, Diagnosing Monopoly, 19 *Quarterly Review of Economics and Business* 7-32, 9-2 (Summer of 1979).

11.2 Many potential barriers to entry include costs which incumbents must bear which rivals did not or do not have to bear. Stigler, "Barriers to Entry, Economies to Scale and Firm Size" in Stigler, *The Organization of Industry*, 67-70, (Def. Exh. AAAAAA). The logic of this sort of definition of entry barriers is clear; if entrants or potential expandants have higher costs than incumbents or must bear costs which incumbents do not bear, the prices might be held above the incumbents' costs in an anti-competitive

11.3 In situations where entrants are simply kept out of the market by low prices and prices cannot b e raised out encouraging entry or potential expansion, most economists would agree that competition, which is supposed to keep prices down, is working. It should not be considered a

barrier to entry if, when faced by potential entry, firms compete.

11.4 Competitively relevant impediments or barriers to entry are limited to factors that substantially disadvantage the most likely potential entrants; "barriers" to the entry of *some* hypothetical potential entrants (for example, so-called barriers to the entry of an individual supermarket into the business of producing fabricated beef products of all sorts) are unlikely to worsen the performance or lessen restraints on the exercise of potential market power. So long as there is a sufficient number of potentially efficient entrants, existing firms will be unlikely to be able significantly to raise prices or restrict output without facing effective competition.

11.5 In economic theory, the necessity to raise a significant amount of capital does not necessarily constitute a barrier to entry. If it is necessary to raise a significant amount of capital in order to be in a business, and if there is a significant risk in devoting such a lump of capital to the business, then incumbent firms, as much as new entrants, bear the cost and consequences of that risk. Profits in the industry must, over the long term, be sufficient to compensate for the risks or costs of devoting the relevant lump of capital to the industry.

11.6 Though many economists have for some time considered economies of scale, which appear to dictate relatively large firm size in comparison with the market, as a barrier to entry, to call such economies barriers under all circumstances is in effect to say that market performance would likely be better were efficiently small firms to enter. To label scale economies or requirements of large size as an entry barrier under all conditions is to ignore the practical question of how many firms can be expected to occupy a particular industry.

11.7 Based on my discussions with Mr. David Neubauer, on my review of a body of published literature concerning

the industry and of discussions with Excel officials, it does not appear that there are significant barriers to entry into the cattle slaughtering or beef fabricating industries, or to competitive expansion of existing firms. As to capital requirements for entry, Mr. Neubauer has estimated that a reasonably efficient, stand-alone fabrication facility can be built new for approximately 10 million dollars. Thus, a new purchaser could enter into cattle procurement and according to Mr. Neubauer's experience in the industry, be reasonably efficient for this amount. To be sure, significant working capital would be required, but such capital can be obtained by firms whose owners have reasonable equity in the business and, in any case, does not count as a sinking of fixed assets into the industry. As of 1951, Joe Bain estimated that a fixed capital outlay of more than 10 million dollars was required before even modest impediments to entry resulted. In 1983 dollars, this amounts to well over 35 million dollars. J.S. Bain, *Industrial Organization* at 284 (2d. ed. 1968). Mr. Neubauer also estimated that a new, reasonable scale fabricating facility could be built for approximately the same capital investment, and an integrated facility for approximately 20 million dollars.

11.8 Even if substantially larger amounts of capital investment are required for new entry, these requirements do not necessarily constitute barriers even by standards of the past. Not only has the general price level risen substantially since Bain made his estimates of capital requirements for entry, but so has the size of the capital markets, but the amount of external funds raised by corporations increased by approximately seven fold.

11.9 Although slaughter or fabrication plants with capacities in a single shift larger than the approximately 1,200 per day level will have lower costs, the cost savings do not come without certain adverse consequences. As Mr. Neubauer's affidavit demonstrates, larger plants may incur higher transport costs as they must transport cattle far-

ther. And although large firms may benefit by being able to sell to large customers, they may at the same time lose flexibility to adjust quickly to changing market conditions and be flexible in purchasing a wider variety of cattle, both fed and nonfed. In any case, scale economies do not appear to dictate large sizes relative to the overall market. For example, even a 2,400 head per day plant would process only about 624,000 head in a 360 day year, or approximately 1.7% of 1982 commercial cattle slaughter. Table K-5, Def. Exh. BBBBBBB. Thus, plant level economies scale do not appear to dictate such large sizes that they likely constitute barriers to competitively necessary entry.

11.10 Although there may be certain economies or benefits from multi-plant operation, these are by no means uniform nor are single plant operations obviously doomed. Multi-plant operations can better take the risk of experimenting with technical improvements or rearrangements of the production process, but smaller firms, as noted above, can take advantage of good management to react quickly to changing market conditions. An example is Hyplains Beef in Dodge City, Kansas, which operates a relatively small slaughter facility profitability.

11.11 The purchase and expansion of an existing plant can result in entry at lower costs and greater speed than new construction. One recent such entry is Val-Agri. Monfort's purchase of the Grand Island, Nebraska plant from Swift in 1979 is another example of the purchase of a stand alone slaughter plant that has expanded and added a fabrication facility.

11.12 By standards of many industries, the time required for planning and constructing the facilities appears relatively modest. According to Mr. Neubauer, a new slaughter and fabricating plant can be planned and built in as little as 12 to 15 months. Several facilities have been constructed more rapidly, including that of Midwest Animal Products, which took 5 months to set up.

11.13 Working capital requirements for slaughter facilities can be substantial due to federal laws requiring payment for live cattle within 24 hours purchase. Mr. Neubauer estimated the working capital requirement for a 1,200 head per day slaughter facility at 10 to 12 million dollars; because fabrication facilities do not purchase live cattle, their working capital requirements are less—perhaps 6 million dollars. Such working capital is not difficult to finance.

11.14 Existing firms can expand in a variety of ways, most readily by increasing the hours worked or by adding extra days of operation. Although adding a second shift may require some investments, newly built plants are usually designed with built in capability for expansion which substantially reduces the cost. For example, Neubauer estimated that, if expansion had not been anticipated it might cost 2.2 million dollars to add a second shift to a 1,200 per day slaughter/fabrication plant. These costs can be reduced by planning for expansion, as Mr. Neubauer indicated. In addition, it can be considerably cheaper to expand a single shift capacity of an existing plant than to enter de novo. Start up times for plants appear to be modest by standards and other industries. For example, following Monfort's purchase of the Grand Island slaughter facility from Swift and Company in only a little more than a year, Monfort had increased slaughter capacity and added a fabricating operation.

11.15 Other firms have entered the industry recently, with Sterling Beef adding a fabrication plant to the already existing slaughter facility. A new firm, Nebraska Boxed Beef, has recently announced plans to build a fabricating plant in Omaha with schedule set up of April 1984. And Swift Independent, which was spun off by Esmark has recently been modernizing its facilities and has become relatively invigorated.

11.16 Unlike some other industries, certain conditions in the beef business act as inducements or encouragements

to entry rather than barriers. The proper equipment and technology are generally available, and under present conditions, it appears that entrants can hire contractors and designers such as Omeco Boss or.[sic] It is also clear in many cases that new entrants (such as IBP was in the past) continue to have a wage advantage relative to old line packers such as Armour, Swift, Cudahy, and others.

11.17 In addition to Val-Agri, Con-Agri, a large agricultural firm with assets of over 500 million dollars recently purchased a slaughter and fabrication plant from Armour. A number of firms in related industries appear quite capable of surmounting whatever impediments, if not actual barriers, to entry there may be. Capital requirements appear modest, scale imperatives are not such as to force entry at very large size, existing plants can be used as the nucleii for growth and technology, and the skilled personnel can be readily obtained.

11.18 Notably absent in this industry is one factor which some economists consider to be a significant barrier to entry—large scale advertising and product promotion. To be sure, some customers may have a preference for the products of firms who they know to be reliable and dependable, but such preferences are clearly based on product performance and cannot properly be considered barriers to entry of the sort that can allow existing firms and to competitively restrict output and raise prices. Rather, they are the result of superior product performance. There is every reason to believe, in my view, as an economist, that purchasing decisions will be rationally based on risk, cost and expected profit considerations.

11.19 Not only do the conditions of entry to the industry appear to be favorable, posing no significant and anticompetitive barriers, but the actual record of entry and expansion indicates a substantial degree of activity. The absence of a large number of very substantial scale entrants demonstrates more, in my view, that the industry

is performing competitively than that there are substantial barriers. Considering the nature of the industry, and the relatively modest profits which appear to be earned by most participants in it, the record of entry and expansion appears to indicate that were encumbents to attempt significantly to raise the prices of boxed beef or of other beef products, new entry and competitive expansion would be rapidly forthcoming.

11.20 In my view, the trends toward decreased number of small plants of relative small sizes and increased sizes of firm represent more the natural consequences of the diffusion of the boxed beef/massed produced primal cuts innovation in a competitive industry than an industry moving towards a tight oligopoly structure in which competitive problems may be a concern.

OTHER MARKET CONDITIONS LIMITING COOPERATION

12.1 To estimate the likelihood that an acquisition will have significant anticompetitive consequences, economists consider the factors in the relevant markets conducive to enduring cooperation and those factors which undermine such cooperation. The cooperating group must insure that each significant member perceives it as in his interest to forego the temptation to "cheat" on the artificially elevated price structure and so enhance his or her own profits. In oligopolistic coordination, each firm will perceive that its profits could be substantially increased if only it could sell somewhat more at the artificially high price. Yet, if all or even a few members of the industry take this action, output will no longer be restricted below what it otherwise would have been, and prices will tend to return to competitive levels.

12.2 Similar problems of cooperation and incentives to "cheat" arise in oligopsonistic tacit cooperation. If industry members somehow are able to depress the price of cattle

below what it otherwise would have been by restricting their purchases, each individual member of the industry will desire to purchase more cattle, if only that can be done at the lower price. Yet, if many members of the industry take this action, the result will be that purchases of cattle will rise back toward the competitive level, thus bidding up the price and destroying any oligopolistic gain that might have been reaped.

12.3 Given these individual firm incentives to act independently in order to increase profits, sustaining cooperation requires that industry members be able to detect and in some way punish, (perhaps by localized price cutting directed against "cheaters") express deviations from the cooperative norm. For such mechanisms to work effectively, it is recognized that members of the industry must be able to determine with some accuracy, whether the tacitly agreed upon price or price structure or output or purchase "plan" or "targets" are being adhered to. It is generally accepted by economists that factors which make industry pricing and output practices and patterns complex and difficult of post-monitoring, tend to increase the incentive to cheat and reduce the effectiveness of and likely duration of tacit coordination or anticompetitive cooperation.

12.4 To maintain a noncompetitive price structure, firms must adjust in a reasonably coordinated way to change market conditions and not succumb to the divisive forces that arise as market conditions change. Thus, the more that demand and costs change and fluctuate, and the more that various random events impinge upon firms' profitability and sales, the more it [sic] difficult will be for cooperation to be sustained.

12.5 Certain market factors can be conducive to cooperation, including quite high concentration, relative homogeneity of product, and absence of good substitutes.

12.6 Having examined the circumstances and institutions of this industry in light of available economic teachings and my own experience, I have concluded that a number of market characteristics operate substantially to limit the probability of effective cooperation. Therefore, in the context of this particular industry, the concentration and market share figures observed have less significance than they might in some other circumstances.

12.7 Complex patterns of pricing and sale. Mr. Monfort testified in his deposition, and Mr. Smith has described to me in conversations and I understand will testify, that the purchasing of fed cattle is highly complex, requiring numerous judgments on the part of the buyer, and price adjustments to take account of numerous dimensions of the quality of the cattle, as well as frequent personal negotiations between buyers and sellers. Mr. Smith has told me that in determining buy orders issued to his buyers, he considers an enormous range of factors, including orders for beef products, levels of and expectations concerning beef prices, the activities of competitors in purchasing cattle, seasonal factors, his firm's costs and profits, and a wide variety of other factors. Based on differences in judgments among firms, as well as differences in their product mixes, locations, and market positions, as well as in the level of sales of their customers, various firms in the market will tend to differ as to the most appropriate level of cattle prices. Compounding this complication is the fact that the orders of the market participants' purchasing managements are implemented by buyers who operate over wide geographic area and must make frequent judgments.

12.8 Given these complications of cattle pricing, it is my judgment that a cooperative anticompetitive method of buying cattle would be most unlikely. Principal among my reasons for this conclusion is that there is a very large number of dimensions on which firms might cheat on a tacit cartel price structure in order to obtain extra cattle

and increase their profits, while hoping to avoid detection. Some of the complexities and divergences of interest among firms arise from their use of rather different pricing mechanisms. For example, Mr. Smith indicated in a meeting with me that in making its buy orders for cattle, Excel works not with Yellow Sheet prices, but with actual boxed beef and cattle by-product revenues. Unlike IBP, Excel buys a significant number of cattle on various contracts related to futures prices of cattle, introducing another dimension to the pricing problem and creating another area for potential divergence of interests with IBP.

12.9 Similarly, boxed beef and beef products, though sharing certain similarities, are not homogeneous products and have a wide range of differences of grade, cut, quality, and yield. In addition, I have been informed that Mr. Meiergerd will testify that beef product pricing is a highly complex process involving taking into account a wide range of diverse factors, some of which impinge upon different rivals to different degrees. Many if not most transactions are negotiated, and depending on the firm's inventory situation, the extent to which some of its beef is near to the point of perishability and on the firm's particular inventory situation, individual firms in the market will at different times have quite different price preferences. Given this, and the number of dimensions of beef pricing, the incentives to cheat on a tacitly collusive price structure and the opportunities to do so appear to me as an economist to be quite substantial. In these circumstances, it would be most difficult for cooperation to be effective for any significant period of time. In addition, such factors would also make it difficult for firms in the market initially to come to any form of accommodation.

12.10 The presence of large-scale purchasers of beef will tend to undermine the ability of beef producers substantially to raise their prices. Of particular importance in the industry is the degree of knowledge and sophistication concerning beef pricing and production costs that is held

by many of the larger customers. For example, Winn-Dixie **** [Deleted Material Refers to Information Subject to Protective Order; See Sealed Joint Appendix] has some of its own fabricating capacity, and thus has benchmarks for costs and prices as well as substantial knowledge of the markets for beef and current developments therein. Substantial buyers have incentives to encourage deviations from cooperative pricing. **** [Deleted Material Refers to Information Subject to Protective Order; See Sealed Joint Appendix] Such retail firms have very significant interest in the pricing of beef. Some of the customers could credibly enter the beef business themselves. In such an environment, implementing anticompetitive cooperation would be most difficult; sustaining it would be harder yet.

12.11 Examination of selected literature on the demand for beef discloses that the overall price responsiveness or elasticity of demand frequently is estimated to be quite substantial. This means that the potential gains from cooperative raising of beef prices are less than might otherwise be the case, because price increases would tend to reduce the quantity demanded significantly, and, in addition, the potential gain to an individual firm from price cutting is increased due to the greater price sensitivity of demand. I understand that witnesses have testified that particularly in response to supermarket specials, consumers tend to shift from beef to other meats, particularly pork and poultry. Examination of USDA publications such as the *Poultry and Livestock Outlook and Situation* discloses frequent references to the effects on beef sales of available supplies of broilers and pork. Mr. Monfort testified in his deposition that beef suppliers consider pork and poultry prices and supplies in deciding what they are willing to pay for cattle. Given the cyclical movements in the supplies of these other products and their prices, anticompetitive coordination of prices becomes most difficult.

12.12 Several other factors operate to increase the degree of uncertainty and instability in the supply and demand

for beef, hence undermining the ability of firms to maintain a cooperative price structure. For example, the demand for beef frequently shifts in response to cyclical or other movements in the supplies or prices of such products as poultry and pork. When the demand for beef shifts down, beef producers might wish to reduce their purchases of cattle and their production of beef products. However, several firms in the industry, including Excel at some of its plants, have labor contracts which require that workers be paid for approximately 36 hours work weekly whether or not that much work is done. Given this, and given the incentive to fully utilize plants, firms frequently choose not to cut back output or cattle purchases, as they perceive that the benefits from doing so are reduced by the requirement that workers still be paid. As a result, beef production may be maintained even when demand is temporarily down. Unlike some other products I have studied, such as platinum, beef is quite perishable. It is quite difficult for beef suppliers to attempt to respond to a temporary decline in demand by increasing their inventories of the product. Thus, the nonstorability of beef leads firms promptly to sell their available production, even when demand conditions are quite unfavorable.

12.13 Related to this, feeder cattle are not highly storeable: it is costly to maintain them, and as they continue to feed, they become overly fat and tend to enter less valuable yield grades. Thus, if packers attempted a cooperative purchase restriction, they would be faced with the fact that at least in the short run, the feeder cattle reaching the end of economic feeding programs would be placed on the market, creating substantial temptations to cheat on the agreement. Once the cattle had been purchased, the lack of storeability of most of the resulting beef products would create pressures to expand production and sales.

12.14 The prices for cattle and beef tend to fluctuate daily or even over the course of a day, and firms constantly attempt to adapt to and take advantage of these changes.

Under these circumstances, a cooperative price structure would require constant revisions, a most difficult task for even a formal cartel. In addition, since slaughter and processing and transportation costs differ substantially among plants, and even among plants of the same firm, it would be quite difficult for firms cooperatively to arrive at a price structure. The basic reason for this is that those firms which have relatively high plant costs will tend to prefer lower prices for cattle and higher prices for resulting products such as boxed beef. In an environment where prices require frequent adjustment to coordinate boxed beef or fed cattle prices would be highly unlikely to succeed.

THE LIKELIHOOD OF PREDATORY OR EXCLUSIONARY BEHAVIOR

13.1 For the reasons I have described above, I conclude that the acquisition does not significantly increase the likelihood that the beef industry will become less competitive either in cattle procurement or in the sale of beef products. The same reasons lead me to conclude that the behavior the plaintiff describes as likely to result from the acquisition will not have the competitive consequences plaintiff claims. Because, in particular, of entry conditions in the industry and the absence of other conditions necessary for exclusionary schemes that might result in the creation of market power, I believe that if firms exit the markets, it would be the result of the market's competitive evolution, and not the result of either the acquisition or any phenomenon of market dominance.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 3rd day of October, 1983, at Denver, Colorado.

/s/Michael W. Klass

Michael W. Klass

[Attachments Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

REPORTER'S TRANSCRIPT TRIAL TO THE COURT

Proceedings before the HONORABLE SHERMAN G. FINESILVER, Chief Judge, United States District Court for the District of Colorado, beginning at 9:05 o'clock a.m. on the 5th day of October, 1983, in Courtroom 201, United States Courthouse, Denver, Colorado.

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* * * *

[Tr. p. 26]

THE COURT: Give us your name, would you, please.

THE WITNESS: Kenneth Monfort.

THE COURT: Your profession or occupation, please?

THE WITNESS: President and Chief Executive Officer of Monfort of Colorado.

THE COURT: Is it a corporation, Mr. Monfort?

THE WITNESS: It's a Delaware corporation.

THE COURT: Primarily located outside of Greeley, Colorado; is that correct?

THE WITNESS: Yes, sir. Headquarters is in Greeley.

THE COURT: How long have you been engaged in the industry, please?

THE WITNESS: In the industry, I guess since basically I was five or six years old, probably. So that would be about 50 years.

THE COURT: A long time. Presently what does Monfort do, your company?

THE WITNESS: We are a company that we start out, we feed cattle, we have two packing plants, we have two portion-type plants that grind hamburger, cut portion steaks. We have a trucking division. We have 22 distributing branches throughout [Tr. p. 27] the West Coast and southern part of the country. Fairly integrated in the cattle, and we are also in the lamb business, by the way.

THE COURT: Pardon me, please?

THE WITNESS: We are also in the lamb business.

THE COURT: Approximately how many employees do you have total?

THE WITNESS: A little over 3,000.

THE COURT: Does that vary sometimes or is it pretty constant?

THE WITNESS: It's pretty constant, at least since we reopened the Greeley packing plant.

* * * *

DIRECT EXAMINATION

Q You indicated that you were first involved in the cattle [Tr. p. 28] industry as a very young man, Mr. Monfort, and would you please tell me briefly what your experience was in the industry up until the time you went to college?

A Well, basically at that time we were more of a farm than an industry, and my dad farmed and fed cattle, and I got to do the normal chores, and as the cattle feeding business grew a little, why I would check cattle pens for sick ones, et cetera, run feed wagons. At that time we were still using horses, et cetera, which is normal chores.

Q Tell me about your education at the college level. Where did you go to school?

A I went to Colorado State University.

Q What sort of subjects did you take?

A Well, my major was animal nutrition. I got mixed up in biochemistry, but I didn't graduate.

Q How long did you go to CSU?

A Three years.

Q What did you do after you left CSU?

A Went back to work with my father. The company had grown some, but basically the same type work as I did before, although I got more involved in cattle purchasing, feeder cattle purchasing.

Q When did you leave college and go back to the family business?

A 1950.

[Tr. p. 29]

Q Tell us what happened during the decade of 1950 to 1960 in your personal business?

A Well, the basically the feeding business that my dad was conducting became—somewhere in there—became a family corporation, but it grew from eight- or ten thousand head on feeding to somewhere around 25- to 30,000 in that decade, and toward the latter part of that decade we decided that we needed to have a packing plant built in Greeley.

We tried to get other packers to do that, and eventually ended up doing it in conjunction with a Denver packer, Capital Pack, at that time. But that opened in 1960.

Q What positions have you held or duties performed in connection with the packing business, and let's—well, let's say what did you do during the 1960s?

A During the 1960s my job shifted from basically being in the feedlot business to basically being in the packing business. After the first year of operations we were something less than successful, and we got to buy our partners out who were disallusioned (sic) with that packing business in Greeley, and we bought that out, and I ran basically the packing company throughout the '60s.

Q Did you also—

A Had a brief fling in politics that didn't work out too well.

Q Did you also have an involvement with the feedlots during the time in the '60s when you were running the packing plant?

[Tr. p. 30]

A Oh, yes. We were, you know, it was a family company, and I guess Dad sort of ran the feedlots and I sort of ran the packing company, but I was involved in the feedlots and he ran me.

Q Did there come a time when the company became a publicly held company, Mr. Monfort?

A It became a public company in 1970, January of 1970.

Q And will you tell the Court what positions you have held with the company since 1970 up until the present?

A Yes. I have been President and Chief Executive Officer from 1970 until, I believe, 1976. At that time I guess I was tired of that and we chose another person to be President, and I was a senior vice president that ran the feedlots and packing divisions. In 1980 I came back and became President and Chief Executive Officer.

Q And that's the position you hold today?

A Yes, sir.

Q Is Monfort of Colorado—and I am going to refer to the company as simply Monfort from now on just for brevity—is Monfort now, or has it been, a member of any industry or trade groups and, if so, will you name the principal ones.

A Basically in the packing industry we used to be members of the AMI, the American Meat Institute, which is probably the largest trade group. We dropped that membership. Now we belong to the National Meat Association, which is sort of the [Tr. p. 31] poor relative

there. And we belong also to the Western State Meatpackers Association.

We are also members of the National Cattlemen's Association, Colorado Cattlemen's Association, Colorado Cattle Feeders Association, Colorado Meat Dealers.

Q Have you personally been active in the beef industry outside of your own company?

A Yes. I was on the board of AMI. I am on the board of the National Meat Association. I have given way too many speeches, way too many places.

Q Let me come to that in a minute. Have you held any offices or positions with any of these trade groups other than the ones you have mentioned, for example, the Colorado Cattle Feeders or—

A I was Director, but I haven't been officers, no.

Q Okay. Have you served on any public body associated either with the beef industry or with agriculture generally?

A Well, yes. I was on the Secretary of Agriculture's Beef Advisory Committee in the—I believe that was the early '70s.

Q That's the United States Secretary of Agriculture?

A Yes, sir.

Q All right.

A I did several studies for AID—AID, which has a different connotation now, but it's Agency for International Development. Studied the beef industry in Kenya, the common market in Central [Tr. p. 32] America, on contract with them. Gave them some advice which they followed in some instances. I was on the Board of—the State Board of Agriculture for five years.

Q Is that the Colorado State Board of Agriculture?

A Yes, sir.

Q Have you written or spoken publicly on subjects related to the beef industry or agriculture generally?

A Yes, a number of times.

Q Before what sorts of groups, and just generally on what kind of subjects, Mr. Monfort?

A Oh, speakers are hard to come by, so there's a lot of demand for people that will do it. I spoke at—oh, I think 25 to 30 land grant colleges at various cattle beef meat functions. Number of trade associations, National Cattlemen's Association conventions.

Q Do you have any sense of approximately how many public talks you have given on subjects related to meat or beef?

A I don't know. I suppose four or five hundred.

Q Let me turn to Monfort of Colorado, the Plaintiff in this case. You have already indicated in answer to the Court's question what it is generally—the general nature of its business is. I want to talk about the company as it exists today, Mr. Monfort. First of all, you mentioned in answer to the Court's question that you had a feeding business. Does the company own and operate feedlots?

[Tr. p. 33]

A Yes. We operate two feedlots, both of them about ten miles outside of Greeley, Colorado.

Q And you said that you had two packing plants. Where are those plants located, please?

A Greeley, Colorado and Grand Island, Nebraska.

Q Do both of those plants perform both a slaughtering and a fabrication function?

A Yes.

Q And is it fair to describe them, or would those plants be described in the industry as integrated plants?

A Yes.

Q What is the present capacity of each of those plants per shift? Can you give us those figures?

A On a slaughter basis, Grand Island is about 3,800. Greeley about 2,800. Fabrication-wise, Grand Island about three, four hundred, and Greeley about 2,500 per day.

Q Again, in answer to the Court's question, you sort of identified the various divisions or support divisions of the company's operation. You mentioned that you were in the lamb business as well as the beef business. Would you describe what your relationship is to the lamb business? Do you have a lamb plant, for example?

A We don't own a lamb plant. We nave lamb custom slaughtered and processed for us here in Denver, and that business basically we buy the lambs and sell the meat and pay a custom guy in [Tr. p. 34] between to do the work.

Q Okay. What were the approximate total sales of Monfort for its most recent fiscal year, which I believe ended August 31, 1983? Is that correct?

A Actually it was September 2nd, that week. We haven't reported publicly, but it will be around a billion four hundred million dollars.

Q And would you tell me, please, what is Monfort's profit margin on its packing operations as best you can calculate it for the most recent year?

A On packing operations alone the profit margin on a pre-tax basis would be something like 8/10ths of one percent.

Q Is that typical of profit margins in the beef packing industry, if you know?

A I would think it's embarrassingly typical.

Q How do profit margins in the beef industry compare with profit margins in other industries, again if you know?

A Well, I think as an industry historically, why, we have been noted as being one of, if not the lowest profit margin industry in the country.

Q And that's been generally true during your business lifetime?

A Yes.

Q We have, I think, on the record about all we need about the origins of the company, except just tell me when the business was started. You indicated your father started it when? In the 1920s?

[Tr. p. 35]

A Well, my dad started farming right after World War I. He joined his father who was farming north of Greeley. He started farming—I guess that would be 1919, and I think he fed his first cattle—his timing was great—right about 1929 or '30, right during the Depression.

Q But continued to feed some cattle during the Depression?

A Yes.

Q About how many cattle were on feed, or was he feeding at the end of World War II—or let me do this. About how many cattle was he feeding at the time that you went into the business after you finished college, after you got out of college?

A Well, prior to World War II, why he was feeding about 2,500, and that lasted, 2,500 to 5,000, during World War II. And I think he was up to around 15,000 about the time that I came back from college. We had a bad

market, and I think by 1954 or so we were back to 5,000, but then it grew from there.

Q Okay. And you continued as—or the business continued as the feedlot only until about 1960?

A Yes.

Q What caused the company to go into the meat packing business at that time, Mr. Monfort?

A Basically it was a combination of things. The freight we were having to pay on cattle from Greeley to Denver. The fact that our feedlots had gotten to be of a size to where a number—[Tr. p. 36] the numbers we had to sell were difficult to sell to local packers. We were still shipping cattle to a central market in Omaha, Chicago, Kansas City. Plus, I think, we thought that none of these plants we were selling to were particularly modern. They were all pre-World War II plants, and it just seemed to us to make tremendously good sense to have a packing plant where the cattle were instead of hauling the cattle to where the packing plant was.

Q Was the Monfort plant at Greeley initially just a slaughtering operation?

A Yes. For five or six years it was slaughter only.

Q What sort of product—what was your output product at that time?

A We produced carcass beef and shipped it as hanging carcass beef throughout the country, mainly New York City.

Q What kind of people were you selling to?

A We were selling to retail chains, to jobbers, what we call jobbers, and breakers who basically either deliver those carcasses to chain stores or cut them into pieces and delivered them to people.

Q How were they transported? By trucks?

A They were transported from our plant back, and at that time why a good deal of it was by railroad. We still had a viable rail industry and unrefrigerated freight then. But eventually that turned into trucks, and carcasses are suspended from the [Tr. p. 37] roof on rails. I call it naked. They are unprotected and shipped to the customer.

Q Okay. Did there come a time when the Monfort plant at Greeley commenced fabrication operations?

A Yes. We started that in '65 or '66.

Q What caused the company to go into that operation?

A Well, in essence the business we were doing we deemed was not the way it should be done. We were shipping a lot of fat and bone to New York City or Los Angeles, wherever the carcasses were going. Often times the meat would get out of condition because of refrigeration problems. It wasn't protected. It wasn't sanitary hanging in those trucks naked.

It just—also you would get—you talked to customers in New York and they would say, Well, the market is bad on chuck, so they got to buy the carcasses for less, and so for a number of reasons breaking those cattle into smaller pieces, keeping some of the fat and bone and rendering it at the plant made sense. Protecting the meat made sense.

By that time we thought we, the industry or suppliers to the industry or suppliers to the industry, [sic] had developed vacuum packages that would preserve the meat, and it just made sense to be able to ship the cuts of meat to the customers that wanted instead of shipping the carcasses to the customers that may just want part of it.

Q What percentage of your production is fabricated today?

[Tr. p. 38]

A Today, why we will fabricate basically our entire slaughter excluding those cattle, those carcasses that don't meet our specifications to go into our box program, so that's about 90 percent at both plants.

Q About 90 percent get fabricated?

A Yes.

Q Let me switch gears on you a little bit now. We have been talking about your company, and I want to ask you some questions about the beef industry more generally. If, first of all, would you take a moment and just describe the beef industry and let me just pick a point in time. I am going to suggest the end of World War II. Tell me who the major firms were at that time, how they slaughtered, where they slaughtered.

A At the end of World War II it was basically the same as it had been before then. The major firms were Swift, Armour, Wilson, Cudahy. Their plants were all located on—at central markets. Central markets being Chicago, Omaha, Kansas City, here in Denver, Fort Worth. You name it. Those types of markets. They were basically old plants, multi-story plants, multi-species plants where they would process in many of them hogs, cattle and lambs. They were basically set up for high volumes, for short times of the year because the feeding industry really had just been developing.

As I say, the—that was when the cattle were expected to go to the packing plants instead of vice versa.

[Tr. p. 39]

Q How were those cattle brought to those particular kinds of what you've described as central market packing plants, and where did they come from?

A Well, the central markets were located where railroads cross basically because that's literally you had cattle from all over the country going to these central markets. They would go by rail. That was before much truck transportation, at least long-distance truck transportation. They would come from the producer, the rancher who had produced those cattle.

The seasonality part of it occurred because the rancher harvested his cattle crop much the same as a vegetable farmer would today, in late summer or fall. He had to cut his numbers down to get through the winter, and it was the time he sold his cattle. You don't sell cattle off of a ranch normally when the grass is getting green. You sell them when it's drying out, so there were tremendous runs of cattle in late summer and early fall, and at these central markets, and the only buyers at that time would be the packers. That was previous to the cattle feeding industry.

Q Did there come a time when changes started to occur in the industry that you have just been describing?

A Well, yes. And the big change was the feeding of cattle. Initially my dad, many other farmers, started feeding cattle basically for two reasons; first of all, the price because of the concentration of the marketing in a relatively short period [Tr. p. 40] of time, the price of cattle was always very cheap in the fall. At the same time my dad had extra feedstuffs he had produced on his farm.

First of all, farmers always seem to have extra feedstuffs, but, secondly, this was the time that farmers were switching from horsepower to tractor horsepower and they didn't have to feed their horses, so they had more feedstuff, and so he had extra feedstuff.

Other farmers had extra feedstuff, and there was a surplus of these cattle, so the object was just to buy those cattle, feed them something, prolong their life, and then

sell them after this run off the rangeland had finished and the price would normally be higher.

Q Now let me ask you right there. You are talking about feeding cattle. Tell me what is meant by the phrase "fed cattle" or "grain-fed cattle."

A Well, if you go back to that time, why they could have been fed almost anything, but grain is a component part of it. Now fed cattle are cattle that have been grain-fed probably 80 percent of their ration being grain, and grain-fed for a period of 100 or 130 or -40 days, and that tied in. That became basically the third reason why cattle were fed. We had the reason of spreading marketing. The reason of using up feedstuffs from the farm. And as this process developed, why the consumers became aware of the fact that beef had been through [Tr. p. 41] these feedlots that had been fed grain was better quality beef, and that's why we have a cattle feeding industry.

Q Is it your testimony that the cattle feeding industry as you have described it eventually developed after World War II?

A Yes. It was developed I think a little in the '30s, a little in the '40s, but essentially after World War II.

Q And what parts of the United States were commercial feedlots? Is that a fair description? Call them commercial feedlots?

A I think—yeah—I think that's what most people call them. Most people split them into farmer feeders and commercial feedlots. There's some nuances there that doesn't help to get involved in.

Q Well, tell me what you understand a commercial feedlot to be.

A Well, I understand a commercial feedlot basically to be feedlot that feeds cattle for customers rather than own-

ing the cattle they have on feed. There are—and this is what most big feedlots do.

Q Okay. Now tell me in what parts of the United States did this commercial feeding or commercial feedlot start?

A Well, I think that the feeding business really was tried almost everywhere in the country. Because all the farmers had the same problem. There were cattle available to them, but it was tried most places, but it succeeded in certain areas.

Q All right. Now tell me what areas that it succeeded in and why.

[Tr. p. 42]

A Well, rimarily succeeded in the Corn Belt, Iowa, Nebraska. A little later in western Kansas, in the Texas Panhandle, and of course in northern Colorado.

Q Why?

A It succeeded in those areas basically because of two major elements, the major elements being feed supplies and climate. You need as cheap a feed as you can have, and you need as good a weather as you can have because cattle in feedlots don't do well if it's muddy and wet and et cetera, so Colorado has got a big plus on climate, a little minus to the Corn Belt on feed supplies, and they are just reverse of that.

Q Are there areas or are those areas recognized today in the industry as being the principal commercial feedlot areas in the United States?

A Oh, yes.

Q Is that because of the reasons that you have just described?

A Yes. Yes. You know there may have been a couple of other reasons. Banks may have been more aggressive

in some areas. Later, why we got into the tax sheltered-type feeding, and it got into Arizona and California more. But those are sort of local service feeding areas, and the bulk of the cattle are fed from somewhere around central west Texas up to and including the southern part of South Dakota and Minnesota.

Q Let's go back to the beef industry and the changes in that industry. Is it a fact that plants starting at some point in [Tr. p. 43] time—and you can tell me when—started to develop closer to the feedlots?

A Yes. What happened there basically was that the clustering of cattle, because of the successes of the feedlots in certain areas, concentrated the cattle much as the central markets had concentrated cattle. This was happening right after World War II. It became apparent to some number of people that basically, just like we went through, why should they carcass when you can keep 30 percent of it at the plant and not pay the freight cost.

It was even more apparent that you don't want to ship an 1100-pound steer to Chicago to slaughter when you could ship a 700-pound carcass or 490 pounds of meat. So it made sense to move the plants out to where the cattle were.

Q Let me ask you, you mentioned 1100 pounds. Is that sort of the average or typical weight that a steer or heifer comes out of a commercial feedlot for slaughter?

A I used 1100 pounds normally. Steers normally average 11- to 1200 pounds, heifers a thousand. So 1100 is sort of a good average for all of them.

Q All right. Now you mentioned that it became apparent to some that it would be advantageous to build the packing plants nearer to the feedlots rather than vice versa. Who were the people or the companies to whom that was apparent, or who did that first?

A Well, it was strange that the big packers that I have talked [Tr. p. 44] about that basically controlled the industry prior to and right after World War II evidently didn't want to spend the money or evidently didn't see the trend, so they weren't early in going out and building new plants. They didn't want to invest the money. So basically it was new people. It was—we built our plant in 1960. IBP built their first plant in 1960.

Q Let me stop right there. We keep talking about IBP. And I guess that's technically its corporate name today, if it's still a corporation. What was it known as originally?

A Iowa Beef Processors. I guess Iowa Beef Packers and then they went to Iowa Beef Processors.

Q Is that the larger company in your industry today?

A Yes.

Q What caused it to be successful in your opinion, Mr. Monfort?

A Well, they had basically good tough hard management. They built their first plant in 1960. They were very, very aggressive. They were aggressive in a number of areas over the years. They were aggressive in their labor relations. They got better labor rates than the rest of the industry had fairly early. They were aggressive in productivity of their people. They were aggressive in superb quality control. They were aggressive in marketing. So aggressive that they got in some legal problems in New York, breaking that sort of closed deal, but they have been just very, very aggressive and very good operators in the industry.

Q Where is that company's corporate headquarters, if you know?

[Tr. p. 45]

A Well, the corporate—they have been acquired by Occidental Petroleum, but IBP corporate headquarters is in

Dakota City, Nebraska, right across the river from Sioux City.

Q Approximately how many packing plants does IBP have at the present time, and just generally, and in what parts of the United States are they located?

A I think they have 11 or 12 beef plants, except for one in Pasco, Washington and one in Geneseo, Illinois, why they are basically located in that area I talked about, Amarillo, Texas being their southernmost plant. Their newest plant is in Garden City, Kansas. They have one in Emporia, Kansas. Big plant in Dakota City, Nebraska. And then four or five smaller plants in that general western Iowa, southern Minnesota, eastern Nebraska area.

Q You mentioned that IBP was acquired by Occidental Petroleum Company. Do you remember approximately when that occurred?

A Oh, I would think it was two or three years ago.

Q And do you understand its status today to be as a wholly-owned subsidiary of Occidental Petroleum?

A Wholly-owned subsidiary.

Q Now is it fair to say—and I know from reading some of the literature that the term "new breed companies" has been used with respect to some of the companies that came into your industry. Is that a term with which you are familiar?

A Yes. That's been prominent in the trade press for 20 years.

[Tr. p. 46]

Q And IBP would fairly be described as the, I guess, the most successful, or at least the largest of those new breed companies; is that correct?

A Yes.

Q Who are some of the other companies that would fall within that category?

A Well, second largest is Excel.

Q What can you tell us about its development as you understand it? The origin and development?

A Well, Excel—well, let me go back. In the early '60s—and I am not sure when it started—but an outfit that eventually was called Kansas Beef Industries which was located in Wichita, Kansas merged with Missouri Beef Packers, which I think their first plant had been built in 1966. Interestingly built by a brother-in-law of one of the founders of IBP, but those two companies merged and became MBPXL. At that time they were the second largest—well, I may not be right there. Swift was still fairly large then. But they became a large factor. Surely the second largest of the so-called new breed packers, and they continued to expand. They now have plants in Friona and Plainview, Texas, Dodge City, Kansas, and, well, everyone is going to hear a lot about that.

Q We will hear about that later on. Have people described your company as one of the new breed companies?

A Yes.

[Tr. p. 47]

Q How about Spencer, the Spencer beef operation? Is that also a so-called new breed company?

A Yes. And it basically really started a little ahead of the rest of us. A fellow named Bud Pearson and his brother started it.

* * * *

THE WITNESS: It started in 1956, I believe.

BY MR. McCLEARN:

Q How many plants does it have at the present time, and where are they located?

A Three plants located in Schuyler, Nebraska, Spencer, Iowa, and Oakland, Iowa.

Q Do you regard it as a competitor of your company?

A Yes. It's normally called the third largest beef packer.

Q Okay. Now I am going to switch subjects again, Mr. Monfort, and I want to talk about what we have described as boxed beef. Okay?

A Yes.

Q First of all, will you tell me what is boxed beef and how does it differ from carcass beef?

A Well, boxed beef is the result of the fabrication of the carcasses at the packing plant. Basically it is beef that is [Tr. p. 48] normally put in a vacuum package to protect it, and then one or more of those vacuum packages is put in a box and shipped to customers.

Q Is that accomplished by the fabrication process that you told us about a little earlier?

A Yes.

Q What additional—or let me just say this. I guess it's obvious when an animal is slaughtered initially the first product that you wind up with is called carcass beef; is that correct?

A Yes, yes.

Q What additional or different production facilities are required to fabricate boxed beef after you have got the carcass?

A Well, basically with us, and most of the industry, why, if anything, it really takes more room to do the

fabrication than it does the slaughter. It's an entire separate division of most companies. It basically is tables and conveyors and—

Q How about physically? Is it physically separate from the slaughter facilities at your plant, for instance?

A Well, at our plant it's I guess contiguous. It's the cattle move from the cooler of the slaughter operation to the fabrication by a rail and a conveyorized rail.

Q Do the same employees who perform the slaughter function also perform the fabrication function?

A Well, no. We have totally separate divisions. We have [Tr. p. 49] totally different management of those two divisions. The employees really aren't interchangeable. They learn one job and we don't say go to the slaughter part today and go to the fab part tomorrow.

Q Are different skills required?

A Totally different skills.

Q That's true in the Monfort plants, is it?

A That's true in the Monfort plants.

Q Is it true throughout the industry as far as you are aware?

A I think it's true of every sizeable plant I know. In fact, many of them have different labor rates for the two different divisions.

Q I am not sure whether you answered this question, but tell me when did the boxing of beef start in the industry?

A It really started in '65 or '66, but it really wasn't very large until the early '70s, and then it got large from then till now.

Q And you testified I think that your company started boxing beef first in the mid '60s?

A Yes.

Q And you told us what percentage of your production today goes into boxed beef? I think you said 90 percent. Can you give us, based upon your knowledge of the industry, what percentage of all fed cattle slaughtered today end up as boxed beef?

[Tr. p. 50]

A Of all fed cattle slaughtering and what I determine—the packer fabricator will box I believe somewhere around I believe 70 percent.

Q You gave us I think some of the reasons for the rapid growth of boxed beef, but I am going to ask you to explicate those a little bit more precisely from the buyer's side first. Tell me what are the advantages to boxed beef over hanging beef or carcass beef?

A Well, first of all, there's a number of reasons. Most of the buyers of the carcass beef had facilities that were getting old, and they had meat inspection problems. That was one reason. Secondly, many of them liked the flexibility, the flexibility of being able to order ten times as many chucks as they do loins, or have as many ribs as rounds. If they order a carcass they get two of everything. If they order boxes they can get those items that they sell. So they like the flexibility, but by far the biggest reason was the cost saving.

There is just tremendous cost saving for a retailer, or any customer, to buy the boxes he wants from someone who is producing them at the slaughter plant level versus hauling those carcasses and trying to perform that same function in his retail store, or even in a centralized meat plant. I would think that cost saving would run all the way from $30 to $50 per head.

Q To the buyer?

A To the buyer.

[Tr. p. 51]

Q Now look at it from the standpoint of the producer, or in this case your company. What are the advantages to you or to the packer or the slaughterer of performing the boxed beef function?

A Well, basically, obviously we try and make a little money off doing that. We have a consistent outlet for our carcasses which is getting to be a big factor because there is getting to be lots of carcass producers are finding it tough to sell their carcasses in the open market.

We can make better use of rendering facilities. As I say, we—and it's always hard to know whether we are saving it or the customer is saving it—but someone is saving that freight cost of 30 or 40 percent. We get less claims when we sell boxed beef because of the—

Q What's the reason for that?

A Well, the product is better protected. Safety-wise probably 10 percent of the meat we ship is carcass beef hanging in a truck, and probably 50 percent of our truck accidents come from that because it's an unsafe type of vehicle to have on the road.

Q Okay. What about from a retailer's standpoint? Does the purchase of beef in a box have anything to do with his labor costs?

A Well, sure. You know basically what you've done is substitute labor cost at the retail level to labor cost at the packing plant level.

[Tr. p. 52]

Q How about shipping, or how about receiving and handling product from the retailer's standpoint?

A Well, if he doesn't have to unload the trucks he doesn't have the shrink involved and what happens to that

carcass after he buys it at the packing plant level. But one of the biggest things that works for the benefit of someone in the industry, either the buyer or the seller, is that if the work is done on a large scale at the packing plant you train people to do very specific jobs. They become very proficient at their jobs.

If it's done at the retail market, in essence because they may do only five or six carcasses a week, one or two butchers have to learn every job and they aren't very proficient at it.

Q Didn't you mention as one of the factors relating to boxed beef shelf life?

A Shelf life, yes. If, you know, beef just hanging without any protection after a couple of weeks, why the industry says, "Sell it or smell it." If you put it in a vacuum package, why that product is probably good for 30 days. Most of the people we sell to don't want us to keep it 30 days, and we don't like to have our money tied up in it for 30 days, but it's probably perfectly good.

Q To what extent to your knowledge do other major packers produce and sell boxed beef of the type that your company produces and sells?

[Tr. p. 53]

A Oh, I think IBP basically does the same as we do, and literally boxes everything that fits their specifications.

Q How about Excel?

A I think Excel does the same thing. I think they may have a side fabrication where they fabricate some other—some things that don't fit our specifications, and put it in a different brand name.

Q How about Spencer?

A Spencer, exactly the same, except they do have one plant. Their Spencer plant does not have a fabrication facility, and I believe—Well, I don't know.

Q Who are the major producers of boxed beef today in the United States?

A IBP, Excel, Spencer, ourselves, SIPCO, which is what remains of Swift, National, which is a division of Idle Wilde Foods, which is a one-plant operation in Liberal, Kansas.

Q Are those the principal ones that occur to you?

A Yes. You could add Sterling, Circle C and Pepper, and they are combined in some way, yet unknown right now.

Q Do you regard all of those companies to be competitors of your company, Mr. Monfort?

A Yes.

Q In what geographic area is boxed beef sold by your company, and by the competitors that you have just described?

A Oh, I think throughout the United States.

[Tr. p. 54]

Q To what extent is boxed beef perceived in the industry to be a separate product, if you can tell us?

A Oh, I think the industry perceives it totally to be a separate product. You know there is not one buyer in a hundred when you call and say you want to sell him some beef, he means boxed beef.

Q Boxed beef is what he is buying?

A Yes, yes.

Q Okay. What kind of cattle are used in the production of boxed beef in your company?

[Tr. p. 55]

A Basically we would use fed steers and heifers. We would use cattle that are either graded or equivalent to USDA grade good, choice or prime.

Q Do you use any non-fed cattle?

A No.

Q Why not?

A Two reasons. We just don't know what to do with them. It's a different business. We don't know what to do with them, and, secondly, you don't want to get that reputation in the industry, so you make sure that you don't have them.

Q Are non-fed graded by the USDA?

A Oh, they could be graded, but they would be graded in the standard commercial category which—

Q Is that a grading category below good?

A Yes. It starts out prime, choice, good, and that's where we draw our line. We don't box any Yield Grade 4s or 5s which are overly fat carcasses.

* * * *

Q Do you use any cows or bulls?

A No.

Q Why not?

[Tr. p. 56]

A Well, basically same reason. It's a different kind of business. It wouldn't fit our packing plant, our buying force, our sales force or our customers.

Q Do you know if this pattern that you have described, the use of grain-fed or fed cattle, USDA good or better for the purpose of boxing beef, do you know if that is generally true of the other major producers of boxed beef that you have just described?

A I think it's universally true.

Q Who are the principal buyers of boxed beef, Mr. Monfort?

A Principal buyers of boxed beef would be—

Q Categories now, not names.

A Okay. Retailers, retail chains, voluntary co-ops that service retailers, other distributors that service retailers, hotel, restaurant, institutional suppliers which we call HRI people.

Q HRI?

A Yes.

Q That's an anacronym (sic) or something that you use?

A Hotel, restaurant, institutional. We turn that into HRI. And they are basically the people that would service everything from the fancy restaurants to the jails from plant feeders.

Q You told us that you didn't produce any cuts that grade less than good, and you told us, I guess you told us why not. But let me ask this question. Maybe it's the flip side of that [Tr. p. 57] one. What's the attitude of your major buyers towards cuts that are graded less than good by the USDA?

A Well, basically they aren't used by the same type customer, so, you know, obviously they wouldn't want us involved in that business.

Q Would a retail chain, for example, buy a cut that was graded less than good from you?

A No, no. Well, we don't grade them as good. We call them ungraded, but they are equivalent to goods. No, they wouldn't.

Q Same thing be true of—I will withdraw the question. Let me ask you whether that buying preference that you have just described is true throughout the industry to your knowledge?

A Sure, it's true throughout the industry.

Q Okay. Now you started to tell us what yield grades were, but I hadn't gotten to that question, Mr. Monfort. Now tell us what a yield grade in the business is.

A Yield grades are basically a way the Government uses—USDA—uses to determine the cutability of cattle; in other words, the lean ratio, the meat ratio versus the fat and bone ratio. Yield Grade 1 being the best, 1, 2s and 3s being acceptable; and in our boxed beef program, Yield Grade 4 and 5 being too fat, and we don't use them in our boxed beef program. We sell them to someone else.

Q I am sure the Court knows this, but the record doesn't. Isn't it a fact, Mr. Monfort, there are in your packing plant [Tr. p. 58] as well as the packing plants of all of these other companies you have told us about, every day a number of United States Department of Agriculture and meat inspectors?

A Meat inspectors and graders.

Q And are those the people who decide whether a product is prime or choice or good or whatever?

A The inspector decides whether it's wholesome and clean, the graders decide whether it's prime, choice or good and what yield grade it is.

Q Those are employees of the United States Department of Agriculture?

A Yes, sir.

Q Okay. Mr. Monfort, I want to now ask you, based upon your knowledge and experience in the industry, and you have been talking about fed cattle, and that's what I want to focus on.

* * * *

Q All right, sir. I want to talk about the kind of firms that slaughter and process fed cattle of the kind you have been describing, and I think you told us earlier that approximately 70 percent of the commercial production of cattle in the United States are fed cattle; is that correct?

A Yes, fed steers and heifers.

[Tr. p. 59]

Q Okay. Now, first, are there firms that both slaughter and fabricate fed cattle? I think you have identified yourself as one of them?

A Yes.

Q And what would you call that kind of firm?

A I guess I would call them slaughter/fabricators.

Q And is it fair to say that the principal firms in that group are the group of companies that you described a few minutes ago, IBP, Excel, Monfort, SIPCO, National, that group of people?

A Yes.

Q And Monfort is in that group?

A Yes.

Q And did you also testify a moment ago that you believe—no, I withdraw that question. Can you give us your best estimate of what percentage of fed cattle are boxed or become boxed beef?

A Boxed by everyone I would believe is probably 88 to 90 percent.

Q Of fed cattle?

A Yes.

Q And you have told us that in your own operation it's at about the 90 percent level; is that correct?

A Yes.

Q What economies, if any, are involved for a firm that has a [Tr. p. 60] combined or integrated—whatever term you choose to use—slaughter and fabrication facility?

A Well, the economies compared to doing it somewhere else?

Q Let's just say for the moment fabricating at some geographically separate location.

A Well, first of all, one saves the loading of the carcass into a truck. They save some shrinkage on that carcass. They save the unloading of that carcass. Since it is just transferred by a rail. There is normally some trimming that has to be done on the carcass.

Q Let me ask you this. You said it's transferred by rail. You don't mean by railway, do you?

A Not by railroad. I am talking about a hanging rail with a conveyor.

Q Okay.

A There's numerous rendering-type advantages. In other words, a combination slaughter/fabrication plant can afford to have certain rendering facilities that are economic, whether that be edible tallow operations, gelatin bone operations, that any fab plant alone could not begin to support.

Q Okay. Are those the principal economies of a combined operation that occur to you?

A Yes. And probably just the steady movement. You never have to wait on a truck, you know. Things—just—it's just the end of the production line.

[Tr. p. 61]

Q I suppose what you are describing is that it makes for an efficiency of the production process?

A Yes.

Q To what extent, if at all, do you regard companies that both slaughter and fab as a distinct group of competitors?

A Well, I guess it may be oversimplification, but I regard them as basically our only long-term competitors anywhere.

Q Okay. And that again would be—well, it would be the group of companies that both slaughter and fab?

A Yes.

Q Do you believe other companies who both slaughter and fab share that same perception?

A Oh, I really do, yes.

Q Now, secondly, are there what I will call independent commercial fabricating companies?

A Yes.

Q Who are they, sort of generically, and what do they do?

A Well, most of them are located in consuming areas, New York, Chicago, Los Angeles. They are, by and large, what is left of the meat business I described after World War II where we shipped carcasses to New York. They were broken into cuts and delivered to retailers or HRI places locally. And this is basically what is left there.

Now there are some other independent fabricators that are located near packing plants where, for one reason or other [Tr. p. 62] the packer did not want to get into that business, or the fabricator didn't want to get in the packing business, but they have some sort of relationship.

Q Well, who do these kinds of firms buy products from, and who do they sell to?

A Well, predominantly they will sell to local customers, retailers, HRI people. Who do they buy from? They will buy basically from two classes of suppliers. They will either buy from some of the packers who—or from the packers who don't have any fabrication facilities of their own, or they will buy from us, from IBP, from Excel. Those carcasses that do not fit our specifications.

Q Are those the so-called off spec carcasses that you mentioned before?

A Yes.

Q How do these people—I guess maybe you have answered the question. How are they different in their operations from the combined slaughter/fabber?

A Well, basically they are primarily different because a number of them use what we consider off spec cattle. And they are primarily different because I think, by and large, they are a dying breed of business.

Q What percent of fed cattle in your opinion is processed now by these independent fabricating operations?

A Oh, I would say somewhere around ten or twelve percent.

[Tr. p. 63]

Q But they do produce boxed beef?

A Some of them will produce boxed beef. Some of them—well, I think most of them produce some boxed beef, some of them will ship hanging chucks, hanging loins, but most of them have the capability of boxing.

Q Now is there a trend with respect to this group of independent fabbers—you have indicated they are a dying breed, and I guess that answers my question—but tell me what the trend is as you perceive it.

A Well, the trend is that they, and the supermarket warehousers used to handle all the beef in the country, and now they handle very little amount, and I don't believe many of them will last many more years.

Q How long has the trend—and I am restricting my question to the independent fabber now—how long has that declining trend persisted?

A Well, since the boxed beef advent in the packing companies, which really got going in the early '70s, so it's been 12, 13 years.

Q What do you expect the future of that category of fabricators to be?

A I think the future is very dim, except for those that will continue to make their living buying our off spec carcasses.

Q To what extent do you regard that category of independent fabricator as the competitors of your company?

[Tr. p. 64]

A I tend to not classify them as competitors, although obviously they do sell meat to probably some of the same people we do. They do buy carcasses from us, so they are both a customer and a competitor, but one I don't worry about much.

• • • •

Q Do you regard them, for example, the same kind of competitor as IBP or Excel or Spencer?

A No.

Q Why not, Mr. Monfort?

A Well—

Q Or have you already told me, I guess maybe—

A I don't think they are long for this world. They've gone [Tr. p. 65] from being a sizable part of the business to small part of the business, and I think they will become smaller.

Q Let me move to a third category of people who deal with fed cattle, and I will call them retail or customer fabricators. Does that identify a group of people or firms for you?

A Yes.

Q What does that group consist of? What kind of—

A Primarily retailers, Winn Dixie, large retailer in the Southeast, still fabricates a good percentage of the beef they use. Kroger quite a bit and some others to a limited extent.

Q Approximately what percentage of beef are fabricated at this level or by this group of firms?

A I would think somewhere under ten percent.

Q In your opinion, what are the reasons that those firms, those retail firms that continue to fabricate beef choose to do so?

A Many of the same reasons that I talked about with the independent fabricators. They are sort of the last of what used to be a sizable segment of the industry. Safeway, for instance, I think at one time had ten fabrication plants and is down to one. It just takes a while to get out of that business.

I normally claim that it takes a change in management from those that decided to build those costly fab plants to where they decided to close them.

Q Is there a trend then in your opinion with respect to the [Tr. p. 66] fabrication by this kind of retail firm?

A Oh, very definitely. Grand Union, Wallbaum, A&P. You can just go through the list of the large chains, and they used to do their own fabrication, and they are basically out of the business.

Q Do you expect that trend to continue?

A Yes.

Q Why?

A Well, just because of the economies. They cannot utilize the byproducts, the renderable byproducts as well as we can. The freight they have to pay or someone has to pay on that 30 percent of the carcass that is not usable. Just the same reasons that make it really uneconomical for everyone at that end of the distribution system to fabricate it, instead of where it starts.

Q Has any significant retailers who once fabricated and then stopped fabricating gone back into the fabrication business to your knowledge?

A I don't know of one, no.

Q What, if any, difficulties or costs would be associated with the retailer who had been in the fabrication business, went off and then wants to go back into it, just in a general sense?

A Well, first of all, probably when they got out of it their fabrication facilities might well have been equal to most packer fabrication facilities, but over a period of time, why we get [Tr. p. 67] better, we get more sophisticated. The amount of equipment becomes different. They would have to retrain people, they would have to either build or find a facility that is suitable. Meat inspection people, the ones that check for wholesomeness and cleanliness are getting tougher and tougher on what kind of facility they can have. It just doesn't seem to be in the cards.

Q Substantial economic disadvantage to attempting to do that to those firms?

A Yeah. I don't think they could be competitive at all.

Q To what extent do you regard those retail firms who fabricate their own product to be competitors, for example, of your firm?

A Well, there is surely no threat to us. I presume Winn Dixie, for instance, is a significant customer of ours. I presume that if they did not fabricate any of the carcass cattle they would buy more boxes from us. In that limited way they are a competitor. But surely no one that's a threat to us, and again I just don't believe they are going to stay in the business.

Q Do you regard them as competitors in the same sense as the integrated fabbers or slaughterers that you described earlier?

A No way.

Q Now I am going to move to a fourth group of people who use fed cattle which I will call independent customer-owned [Tr. p. 68] processors who fab but do not vacuum pack. Does that describe a group of firms sufficiently?

A I don't know of those firms. It may be a group of people that is used to make something add up to a hundred percent, but frankly I don't know who they are, and—

Q Would it be a significant part of the fed cattle marketing process?

A No. No, it would be a small part of it. It might be locker plants, it might be any number of things that I am just not familiar with.

Q Would you regard anybody in that particular segment of the business to be a competitor of yours or the other slaughter/fabbers?

A No.

Q Or would you, for example, expect or believe that group to exercise any kind of competitive influence on the market?

A Since I don't know them, I surely wouldn't, no.

Q Okay. You told us earlier, I think, that your best estimate of the percent of fed cattle that are processed as vacuum-packed boxed beef was about—did you say 80, 85 percent, something like that?

A I think I said 85 to 90.

Q What happens to the balance of fed cattle that are not fabbed and boxed?

A Basically go to retailers as carcasses.

[Tr. p. 69]

Q Does Monfort sell some meat in carcass form?

A Yes.

Q Why, and approximately—

A Basically it's off spec carcasses. The yield grade 4s and 5s. The overfat carcasses will go to independent fabricators, I think is the classification we use, and that's probably about half of this ten percent we sell. About most of the rest of that, about five percent also would be carcasses that don't fit our weight specifications that are too light for our specifications, for our boxed beef program. Those carcasses are sold to basically distributors or to one or more chains who basically end up distributing them to retail stores as carcasses, primarily the mom-and-pop type grocery stores that still do some carcass business.

Q I think you have answered this in part, but I want you to focus on, if you can, for just a minute the question of whether there are economies in the processing of carcasses at the store level versus the processing that you do at your slaughter plant, or diseconomies, I guess.

A Well, lots of diseconomies. The diseconomy is that they literally have nothing to do with the fat and bone. May in fact instead of it being a value—

Q Which it is to you?

A —to us, may in fact have to pay someone to haul it away. They have no—they can't have the skills and the efficiencies [Tr. p. 70] that we have, as I say, because one person has to do the whole job instead of splitting that job up into many.

Q How about sanitation?

A Sanitation. It's always a problem because those carcasses basically are transported to them without any protective covering and are inclined to get rail dust, dirty or greasy or something happen to them.

Q What about labor cost?

A Labor cost, if the retailers that we know and think of were to do it, why their labor costs would be significantly higher basically because of labor rates, but also because of skills and efficiencies.

Q Why would there be higher labor rates necessarily with respect to the group of people you are describing?

A Well, basically they have to be more skilled. They have to know more jobs than at our plant where we teach them one job. Now the one place, the mom-and-pop grocery store, if it's run by a mom and a pop, just for example, why maybe the pop does have time to do some butchering there, so his labor costs might not be higher, but—

Q Okay. Now you earlier—and I think this is a repetitive question but I wanted to be sure—can you express the difference in dollars per head, the cost differential

between boxing an animal and cutting it up at the retail or user level for retail sale?

[Tr. p. 71]

A Versus doing it at our plant. I think those costs are in excess of $30. I have heard figures up in the $75, $80. I frankly don't know their costs well enough to know that for sure, but it's significantly higher.

Q Is there a trend with respect to in-store carcass processing? Is that the one you have already just told us about?

A Well, yes. The trend has been away from in-store carcass processing, away from store-owned central processing.

Q Do you expect the trend to continue in the same direction in the future?

A Yes.

Q Now, I think we've covered the 70 percent of commercial cattle that are fed cattle, have we not, or at least we have tried to?

A Yes.

Q To round out the picture, what does the other 30 percent of commercial cattle production consist of?

A That consists of cows and bulls and non-fed steers and heifers.

Q Let's talk about cows and bulls first. What approximate percentage of total commercial production do they represent?

A Right now that's running about 22 to 23 percent.

* * * *

[Tr. p. 72]

Q Do you process any cows or bulls?

A No.

Q Why not?

A Because we have—we don't have the plant that's usable for it. They don't fit our rails. They don't fit our buying. They don't fit our sales and our customers would be very suspicious of us if we did it.

Q Did any of the other slaughter/fabbers process cows and bulls to any significant degree to your knowledge?

A No, no.

Q Are they graded by the USDA?

A They can be, but—

[Tr. p. 73]

Q Oh, I asked you that question. They are below good, aren't they?

A Yes.

Q Okay. How about non-fed steers and heifers? What approximate percentage of the market are they?

A Currently about seven or eight percent.

Q Do you process any of those?

A No.

Q Do other packers/fabbers process them to any degree to your knowledge?

A No.

Q Who buys them and for what purpose, if you know?

A Basically I think they are bought and processed primarily by the same people that process cows and bulls and used for the same purposes, which you—yeah.

Q Now let me direct your attention to ground beef. Lots of ground beef produced in the United States, correct?

A Yes.

Q What are the sources of supply for ground beef?

A Ground beef is made up primarily of three ingredients. Well, two ingredients, lean meat and fat trimmings. The lean meat portion of ground beef production comes from cows and bulls or imported meat, and the fat trimmings are a byproduct of ours and Excel's and everyone else's fabrication operation.

Q And that's the trimmings are a byproduct?

[Tr. p. 74]

Q Monfort produces ground beef?

A Yes.

Q What are your sources of supply of product?

A We will ship trimmings from Grand Island to Jacksonville, which is our primary ground beef facility. We will buy cows from cow killers and boners in Florida or in the Southeast, or we will buy imported meat.

Q You have a ground beef plant in Jacksonville, Florida?

A Yes.

[Tr. p. 75]

Q So to what extent in connection with the production of ground beef do you use a different plant or different equipment or different labor force?

A Well, Jacksonville is totally different plant. We also produce some ground beef in Greeley which is in the same plant as our slaughter and processing, but totally different equipment, totally different labor force.

Q Different kind of customers?

A Some of them the same type customers, but a lot of them different types of customers.

Q What is the relationship or lack of relationship between Monfort's boxed beef products on one hand and its ground beef product on the other? Are they same or different products from your perception?

A Well, they are different products.

Q Is there a differential in the price at which you sell boxed beef on the one hand and ground beef on the other?

A Very definitely.

Q Is it a significant difference?

A Significant difference and doesn't necessarily go the same way.

Q Which is higher and which is lower?

A Well, ground beef is cheaper.

Q Okay. You say that the prices don't always go in the same direction. Let me put the question this way: To what extent [Tr. p. 76] do they move in parallel, or are there times when they don't?

A It's impossible for us to project. If I knew the cattle price level and the fed cattle price level I could pretty well project prices of different cuts of meat, except for ground beef. Ground beef is so dependent on the amount of cows and bulls and non-fed cattle, it's dependent upon—it's more closely associated with hog prices, too. Go ahead.

Q Go ahead and finish your answer. I am sorry.

A No, it just doesn't tend to go—march to the same drummer.

Q Have there been occasions when the price of ground beef would be going one direction up or down and the price of boxed beef going the other?

A On numerous occasions. '75, '76, in that time, why they were going opposite directions.

Q Are you familiar with what is called forward pricing?

A Yes.

Q What is it and how does it work?

A Well, forward pricing of beef you are talking about?

Q Yes.

A Forward pricing with us, we will contract meat ahead to retailers, restaurant operators and at a specific price for a specific amount at a specific time.

Q Do you do that with respect to boxed beef?

A Yes.

Q Are you able to do that with respect to ground beef?

[Tr. p. 77]

A No.

Q Why not?

A Because I can't predict the price and hedge it.

Q To what extent in your view is ground beef a substitutable product for retail cuts of your boxed beef product?

A Well, if we segment our business in the HRI portion of our business, it is almost not substitutable. In other words, Burger King is not going to start selling strip steaks because hamburger got high, nor is the Colorado

Mine going to sell hamburger because strip steaks got high, so these people are pretty well locked into the type of meat they are going to use.

In the retail business, why everything competes with everything else, and to some extent ground beef will compete in price with steaks and roasts, the product of boxed beef, but I—that correlation in competition is not very close. It's almost like it's a different species.

Q Let me ask you to take this hypothetical, Mr. Monfort. If the price of ground beef remains steady and the price of boxed beef or retail cuts went up 10 percent, would you expect a shift in consumer demand for ground beef, and, if so, how big a shift?

A Well, you have to start off by assuming the fact that both items, all that you produce is going to be sold. So the fact that the price went up on one and didn't on the other, there will be a shift to clear the marketplace, but a significant shift would leave the other cut unsold, no.

[Tr. p. 78]

Q Let me take just a moment on imports because they have been mentioned in many of the papers filed here. How significant are beef imports, that is imports from offshore in terms of volume?

A They are about 7 percent of the total beef supply in the U.S.

Q What kind of meat is brought in from offshore, and is it graded by the USDA?

A It is not graded and it is almost totally grinding meat or something that would go into ground beef or sausage items.

THE COURT: Are they competitors of yours and the other larger packing companies?

THE WITNESS: No.

BY MR. McCLEARN:

Q All right. Let's turn to exports of beef. In terms of overall volume, how significant are they in the industry?

A Not as significant as we would like. About one percent.

Q Why isn't more U.S. beef exported, Mr. Monfort, just in a word?

A Because those that can afford to buy usually have restrictions, i.e. Japan is, so couldn't buy.

* * * *

[Tr. p. 79]

BY MR. McCLEARN:

Q All right. Now I want to turn to a different subject, and the subject is economies of scale. Do you have a view as to whether advantages exist for slaughter and fab operations which are located together in the same facility, and to the extent that that's a repetitive question, and I think it is to a degree, I don't want you to tell me what you have already told me, Mr. Monfort.

A Yes, there's great economies. Transportation is eliminated, by-product utilization, et cetera.

Q You have mentioned by-product utilization. I am not sure the record is clear. I know the Court knows, but just tell me what does by-product utilization mean to you?

A It means the use of the fat and bone for tallow, meat scrap, gelatin, bone, that product that is not going to be eaten by people no matter where the hell it's shipped.

Q Is that something that you can do as an integrated slaughter fabber that somebody else can't do?

A Yes.

Q And is that a component of the cost saving that you have previously described?

A Yes.

Q Now are there economies of scale with respect to the size of plant, and let's just assume for present purposes we are talking about a slaughter fabber, but let's talk about size of [Tr. p. 80] plant. Does it make a difference how big the plant is?

A Very definitely.

Q Tell me how and why.

A Well, those plants that are most efficient are also the largest.

Q Why is that?

A Well, there are economies of scale. You need one manager. You need one of this and one of that. The biggest plants that exist in the country right now are 4,000-head per day type plants, both slaughter and processing. Their costs—first of all, they can afford to have the very best rendering, the very best box handling equipment, and this gets to be something that is extremely sophisticated.

The fabrication business is like the automobile assembly line, run in reverse. You start out with one product and you produce hundreds of products. The handling and boxing of that product is very costly. It's intensive and it can be automated a great deal. You can't afford to have the necessary computers, the necessary sorting equipment unless you have a sizeable plant.

You can break the jobs, the work down into the smallest segment to become the easiest for someone to perform with the least training. Just many, many processes that make it cheaper to have a large facility than a small facility, particularly when you say those 4,000-head facilities

really are just 2,000-head facilities that are double-shifted and run basically 16, [Tr. p. 81] 17 hours.

Q I want you, if you can, if you are able to, to give me some comparisons, and I am really interested in cost comparisons per head, if you can do it. And let me just say, for example, a 500-a-day head plant, if there are sufficient plants, are there not?

A Yes.

Q And what should we take next, 1500, 3,000?

A Yes. Are you interested in slaughter costs, processing costs, or both?

Q Let's do it combined. It seems to me that's the simplest way to resolve the matter.

* * * *

By Mr. McClearn

Q I have asked you if you could give me your best judgment of the cost savings on a per head basis based upon the various economies of a 500-head a day plant, a 1500-head a day plant, and let's say a 3,000. Do you have a basis for making that kind of an estimate, and, if so, what is it?

A Well, yeah. The 500 gets a little small, the 1500 head per [Tr. p. 82] day plant, for instance, would be the equivalent of what Grand Island was without a double shift at one time.

Q How long ago was that, Mr. Monfort?

A That would have been about three years ago.

Q That was your plant?

A Yes.

Q Okay.

A 3,000 head and 4,000 head plants, why we're awful close to those numbers at Greeley and Grand Island, so I think I could give adequate figures.

Q All right. I would now ask you to do so.

* * * *

BY MR. McCLEARN

Q Go ahead, sir.

A On the 500 head I did say I am not sure. The 1500 head—

Q All right. I will withdraw the question as to 500.

A Okay. Let me start at 1500. If you combine the kill cost—let me just say that our books, and I think most of our major competitors keep different costs for slaughter and fabrication, so—

* * * *

[Tr. p. 83]

A The 1500 head per day plant would be roughly $80 to $85 per head.

BY MR. McCLEARN:

Q What does the 80 to 85 represent?

A Total kill cost and fabrication cost.

Q Okay.

A For one head. The 3,000 head per day plant would be approximately $65 per head, and at 4,000 you would get under $60, probably.

Q All right, sir. What do you regard as the minimum efficient size combined plant?

A Well, from those figures I am tempted to say 4,000, but I think with special circumstances, why probably a 1500-head plant in the right location for the right reasons might be feasible.

Q But it would still have the cost differentials and the approximate ranges that you have just described as compared to the larger plants?

[Tr. p. 84]

A Yes. It would have the $15 to $20 per head cost disadvantage.

Q Now just generally speaking, and based on your knowledge and experience, what is the—what would you regard as the normal pre-tax profit per head on an animal, and how do these cost efficiencies relate to that figure?

A Well, normally we would like to make 2 percent pre-tax. Two percent pre-tax is something like $14 to $15. We, as I testified before, this past year we made about 8/10ths of 1 percent, which would be about $6 per head. So $15 or $20 spread in costs compared to a $6 profit is obviously immense.

Q And would result in a minus figure?

A Yes.

Q You told us what the capacity of Monfort's plants were per shift earlier in your testimony, and you also indicated that Excel has the new plant at Dodge City, Kansas; is that correct?

A Yes, sir.

Q Do you know the approximate size of that plant and when it was completed?

A From what I understand, and I am not privy to some of the information you are, from what I understand it kills about 4,000 head per day. I think it's set up to box roughly

the same number, maybe 3600. The kill part of it was completed, I believe, three or so years ago, maybe four, and fabrication part of it one to two years ago.

Q You also mentioned a new IBP plant at Finney County which I [Tr. p. 85] believe is at Garden City, Kansas; is that correct?

A Yes.

Q Do you have a view as to the approximate capacity of that plant?

A I think it's approximately the same size, 4,000 and—4,000.

Q Are there economies involved in double-shifting plants of these kinds?

A Yes.

Q What are they?

A Well, those costs that are associated with square footage, if you double-shift them, you just need half the square footage. The kill floor for a 4,000-head plant would be very immense if you tried to do it on a single shift. It's reasonable size if you do it on a double-shift basis, so the amount of plant you have to refrigerate, all those things are economies.

Q Let me turn now to the fed cattle procurement question. We have been talking about boxed beef, and that segment of the business, and you have already covered this in part, I appreciate, and you have told us that your firm processes grain-fed steers and heifers exclusively, and I think you have testified that it's your understanding that your major competitors do likewise?

A Yes.

Q This is an area that I am not going to cover extensively, but I think I have to ask you this question, Mr.

Monfort, and [Tr. p. 86] that is whether you regard cows and bulls as a satisfactory substitute for grain-fed cattle?

A No.

Q Why not?

A Because they are used for a different purpose. They are used for grinding meat predominantly, and whole different class

Q Would your customers buy them?

A No. Not for the same purpose. They would buy them for hamburger, but not for the same purpose.

Q What kind of firms process cows and bulls? Where are they located and how do they differ, if they do, from plants such as yours and your major competitors?

A Cows and bulls are not ground together as fed cattle are by the cattle feeding process, so they are scattered all over the country, wherever there is something for them to graze on. So there's great geographical dispersion of the cow and bull killers.

The only true concentration would be in the Minnesota/Wisconsin/upper New york dairy-type regions where there is a number of cows. The plants are all much smaller than the size of plants we are talking about in this case. They tend to be seasonal plants. They tend to be run by small entrepreneurial-type people such as Cattle King here in Denver which has had lots of notoriety, but it's basically a typical type cow-type operation.

[Tr. p. 87]

Q To what extent do firms that process steers and heifers also process cows and bulls?

A Other than the non-fed steers and heifers which are processed by the same type people, the fed steers and heifers, there just is not any cross-processing except in

those dairy states where I think some of the—in fact I know—some of the firms in Wisconsin will process both cows and bulls, and some fed cattle, but that's about the only place.

Q Is that a fairly small part of the area?

A Small, yes. They would be very small part of the fed cattle processing industry.

Q Could a firm such as yours switch from processing fed cattle to cows or bulls?

A No.

Q Why not?

A Our buyers wouldn't know how to buy them, our salesmen wouldn't know how to sell them, our butchers wouldn't know what to do with them, our rail heights are wrong. If we got all the cows in the market area why we could maybe run the plant at 25 or 30 percent full speed.

Q Do you have a perception as to whether cows and bulls are a separate market?

A Totally are.

Q They are a separate market?

A Yes.

[Tr. p. 88]

Q Do you believe that perception is shared by the beef industry generally?

A Yes.

Q I am going to short-form this, but do you regard non-fed steers and heifers as substitutes for—substitute product for fed cattle?

A No.

Q Same reasons you have already told us about?

A Yes.

Q Do you believe that perception—do you regard that as a separate product from the product that you and your major competitors produce?

A Yes.

Q Do you believe that perception is shared generally in the industry?

A Totally.

Q Now Monfort has a plant at Grand Island, Nebraska?

A Yes.

Q That's what? Sort of central east Nebraska?

A Yeah. It's about two-thirds and one-third west, I guess.

Q How does that plant obtain fed cattle for slaughter, from what kind of sellers?

A We basically buy from cattle feeders in the Nebraska area, and some from the central market that still exist to a limited degree in Omaha and Sioux City.

[Tr. p. 89]

Q What sort of a buyer network do you have, or who buys the cattle for you?

A I think we have six or seven buyers who live in different areas around Grand Island. They go out to cattle feeders, farmers, whoever, and bid on their cattle.

Q How large is the normal, or what is the normal procurement area for cattle in your Grand Island plant?

A Oh, normally it's within a hundred, 75 to 150 miles. Normally.

Q Can you give me any approximate percentage of cattle for that plant that are obtained within, say, you pick the number 75 or a hundred miles?

A I would guess over half within 75 miles and probably 85 percent within 150 miles.

Q What other factors, if there are such factors, would limit how far your procurement area can extend?

A Well, the cost involved in moving—you know, I told you that the packing plants went to the cattle, and this is just a continuation of the same question. The cost of moving live fat cattle any significant distances to a packing plant, that limits the distance you can move them.

Q Okay. So transportation costs are a principal factor?

A Transportation costs, shrinkage of the cattle, bruises of the cattle, et cetera.

Q For the record, Mr. Monfort, what are shrinkage and bruises, [Tr. p. 90] and how do they affect your operation?

A Well, shrinkage, if you have carcass shrinkage, you end up with less pounds of meat to sell because the cattle was on a truck or rail facility for a period of time and actually lost some of its meat.

Q Okay.

A Bruises are what you have to cut out because they are inedible.

Q Can you estimate the per-head cost, or maybe you do it in hundredweight, whatever, of transporting an animal, a fed steer or heifer an additional hundred miles? Let's just assume that instead of bringing our animal in from 150 miles, you had to bring it in from 250 miles. Can you estimate the additional cost that that last hundred miles would cost?

A Yes. I would like to do that nice and easy. It is not that easy. It costs roughly a dollar and a quarter to run a truck a mile. If you run it a hundred miles, that's $125. You haul 50,000 pounds of weight, that's 25 cents a hundred or $2.75. Now that would be per head. That would be nice if that was the end of the answer, but in essence if that truck doesn't have a backhaul it has to run the hundred miles back empty, so you've literally doubled that cost.

Q You mean the dollar and quarter truck cost?

A Yeah. You have to pay the dollar and quarter cost to get it back empty.

[Tr. p. 91]

Q Okay.

A Now, you know, so that would make it five and a half dollars per head. Now you can argue that if you can find a truck that is already there that needs to come back your way, you may cut that cost in half or to a third. So there is no precise answer to that. I would think that the cost per head of an extra hundred miles freight cost only would be on the average somewhere three to three and a half dollars.

Q And would that same figure apply if instead of going from 150 to 250 miles you went from 250 miles to 350 miles?

A Yes. Cost is basically the same because you've already covered the loading and the unloading costs and going up to the 150 miles.

Q Okay. And that's against a pre-tax profit per head of approximately how much?

A What did I figure? $6 from last year for us.

Q Okay. Who pays freight when fed cattle are purchased, Mr. Monfort?

A Oh, the cattle feeder thinks he pays it and the packer thinks he pays it. Someone pays it. And if the market situation is such to where we have more bargaining power than the feeder, I guess he would have a good argument that he pays it, and if it's vice versa, we probably would have to pay it.

Q Would it, under any circumstances, and again this is sort of a hypothetical, I guess, be feasible for Monfort to acquire fed [Tr. p. 92] cattle for Grand Island, say east of Illinois?

A No, no. Well, under any circumstances. If we were the only packer in the world and making lots of money, I guess we would have to kill the ones east of Illinois, but we never have, and I can't imagine that we ever would. The industry just is not set up that way.

Q Is there any area that is recognized in the industry as a high volume, high density cattle feeding area?

A Oh, yeah. I think the western Corn Belt and high plains is what most of the trade press, the USDA, et cetera, talks about in that regard.

Q Does the USDA put out publications dealing with fed cattle locations and marketing?

A Yes. They have monthly figures on seven states, and they have quarterly figures on thirteen states.

Q And do you regularly get those publications and read them?

A Yes.

Q What do you believe, or what do you understand the high plains area to be which you have just mentioned?

A Basically Kansas, Oklahoma panhandle, Texas panhandle area.

Q And what do you understand the western Corn Belt area to be as you have just used that phrase?

A Western half of Iowa, lower southwestern part of Minnesota, bottom half of South Dakota and Nebraska.

Q Is Monfort's Grand Island plant located in that western Corn [Tr. p. 93] Belt area?

A In the middle of it, yes.

Q And who are Monfort's principal competitors for fed cattle at its Grand Island plant?

A IBP, Spencer, Land O' Lakes, Excel. Some Omaha packers, Union, BC.

Q Principal ones?

A Yes.

Q To what extent do you regard procurement of fed cattle to be essentially local in nature?

A Well, unless there is some great distortion, some reason for distortion, why we feel it is quite local.

Q What are the reasons for that, or why do you feel that way?

A Well, because of the freight costs involved and the fact that if we try and buy cattle in Texas we have to bid against people that have lower freight costs than we do, and it just normally doesn't work. The cattle won't yield as well for us. The feeder is used to dealing with his regular customer and tends to want to, but basically it's cost.

Q Is it true that all fed cattle that are purchased by packers are slaughtered?

A Yes.

Q Fundamentally all, anyhow?

A Yes.

Q So procurement figures for all practical purposes will be [Tr. p. 94] the same as slaughter figures?

A Yes. There may be a time lag, but they are the same.

Q Are you familiar with the plants of the Spencer Beef Company that are located at Schuyler and Oakland, Nebraska?

A Basically.

Q Do you know where they are located?

A Yes.

Q Do you know where Schuyler is?

A Yes.

Q How far is it from Grand Island?

A Not very far. About 60 miles.

Q How about Oakland?

Q I think it's 100, 120 miles.

Q Are those both combined slaughter/fab plants?

Q Yes.

Q Would you regard them as relatively modern and efficient?

Q From what I understand, yes.

Q Would you expect them to be able to operate profitably?

A Yes.

Q Do you have an understanding—I think it's agreed—that the Schuyler plant, at least temporarily at the present time, is closed? Is that true?

A Yes.

Q Do you have an understanding as to why it's closed at the present time?

[Tr. p. 95]

A I think at the time they closed it they said because of labor rate problems.

Q While we are talking about those plants, Mr. Monfort, was there a time—let me ask you this. There is a third Spencer plant also, is there not?

A Yes. Spencer, Iowa.

Q In Spencer, Iowa?

A Yes.

Q Was there a time when the three Spencer plants, or any of them were offered to your company by Land O' Lakes?

A Yes.

Q When and under what circumstances did that occur?

A Can't remember the day, but it was I think sometime around the end of June.

Q Of this year?

A Yes.

Q Were you contacted by someone from Land O' Lakes?

A Yes. Mr. Hofstad, who I believe is the Chairman or President of Land O' Lakes.

Q Did he call you?

A Called me at home.

Q Called you at home?

A Yes. And—

THE COURT: Let's have the approximate date, Mr. Monfort, if you know, please.

[Tr. p. 96]

THE WITNESS: I think it was approximately the end of June or first of July. I really don't remember.

THE COURT: Thank you.

BY MR. McCLEARN:

Q Sometime earlier in the summer or late in the spring?

A Yes.

Q Okay. I don't want you to answer this question. I am going to ask it and Mr. Hanley may well object to it, but I will ask it. What is the substance of the conversation you had with Mr. Hofstad and he with you?

* * * *

BY THE WITNESS:

A Okay. Mr. Hofstad called and said what all of us knew, that they were in the process of wanting to sell their three plants. That he understood that we might have some interest in [Tr. p. 97] them. I told him that I was flattered if he thought that we could handle three plants, and that basically I wouldn't be interested in more than one plant, but I might well be interested in that, depending on the price, et cetera.

I asked him what he had—how he had priced the plants. He said he had priced the three plants at 85 million, that he was bid awful close to that. That he had been bid better by someone else, but that he didn't think he could get that buyer by the antitrust problems. That if I wanted to buy only—or bid on only one plant—that that would cause them lots of problems, and he really didn't know how to price them other than three together.

I told him—well, I would just—couldn't bid on all three, and he said, well, theoretically, if we wanted to bid on

one plant and if he got bids on the other two plants and he could put all three of them together and get more money, why then he would listen. I said, well, the only plant I would be interested in would be either Schuyler or Oakland, not Spencer. And that I hadn't ever seen the Oakland plant and Schuyler I seen four or five years before and I would need to look at the plants.

He said that I would have to—if I was interested—submit a bid, see if that was agreeable with them. If they got this combination of other bids that made that better for them, and that then prior to looking at the plants he would expect me [Tr. p. 98] to post a deposit to make sure that if the plants did meet our approval, that we would go ahead with the deal.

I told him that, you know, really I just needed to know more about the capacity, the efficiency of the plant, and he told me he would have someone call me the next day. It turned out to be Mr. Dudley.

Q All right. Is that the substance, or did you have more conversation with Mr. Hofstad?

A I think that was all.

Q All right. Did you have a conversation the following day with Mr. Dudley?

A Yes.

Q And who did you understand him to be?

A Well, I got a little mixed up with Dudley and Diven, but I guess he is the head of the Spencer operation, basically.

Q For Land O' Lakes?

A For Land O' Lakes.

Q Okay. Can you tell us the substance of the conversation that you had the next day with Mr. Dudley?

A Mr. Dudley called and said that he had been instructed by Mr. Hofstad to give me some approximate—some cost figures and production figures for Oakland and Schuyler. I told him that in thinking about it overnight, why there was just no way that I was going to be able to bid on one plant under the conditions outlined for me, and that if I listened to his cost [Tr. p. 99] and production figures it would only be because I was nosey, not because I was serious, and I thought I would save him that time.

Q Did he give you any cost or production figures?

A No.

* * * *

Q During that conversation did you make any reference to a desire on your part to have the Schuyler plant stay shut down?

A I frankly don't remember, but I understand that I did, and if I did, why it was in a joking-type manner.

Q Did you at that time have a belief as to whether or not the Schuyler plant would remain shut down?

A I have believed ever since it was shut down that it would be reopened. I am surprised that it has not been reopened prior to now.

Q What is your belief today about its likelihood of reopening?

A Oh, it will be reopened. It's in a good location. It's had [Tr. p. 100] a good—historically a good labor force. It's a good modern plant. It should be one of the most successful plants in the industry. Someone will run it and make some money off of it.

* * * *

[Tr. p. 104]

Q I am going to switch subjects on you again, Mr. Monfort, and I want to talk about how easy or how difficult it is to enter into this business that you are in. You have already testified that you believe minimum size plant that would make any sense today would be at least 1500 head a day, I think, with significant economies resulting as the plants get larger. So what I would like you to do is to ask whether you are able to estimate the approximately 1983 costs for building this minimally viable new plant that you have described some time ago.

My question first is are you able to make such an estimate?

[Tr. p. 105]

A I believe pretty close, yes.

Q And I ask you to assume that it's a single plant and that you would have both slaughter and fabrication facilities if you would, please. Would you tell me what would have to be done and what would it cost. Give me the major components that would go into that kind of a facility.

A Well, basically you would have to first plan where you wanted to put it and find a place where you were a welcomed neighbor. At that time you would have to go through innumerable governmental type approvals, primarily dealing with sewage, air pollution, et cetera. I couldn't imagine that that would take less than six months. Maybe with—maybe three months. But somewhere in there.

That size plant, which none of them have been built that size because industry-wise it would be considered small, but that size plant, if it had these slaughter facilities, maximize the use of renderable product, the processing

facility, box storage, box handling, relatively automated, probably not as automated as the two newest plants, Excel's at Dodge City or IBP's at Finney County, probably would cost $40 million.

Q And that is your capital or construction cost?

A Construction costs, yes.

Q Would that include land acquisition as well?

A Probably.

Q What costs in addition to the capital or construction costs [Tr. p. 106] involved in entering the market and opening up this new plant?

A Well, you would have to have a total of about three days' inventory of product, either carcass beef or boxed beef. That's about what everyone averages, and probably an average of 12—let's say 12 days receivables. So you would have 15 days of production at current prices per head, cost would be something like $750 times 1500 per day. That would be about 1,125,000 per day times the 15 days would be $16- to $17 million inventory and receivables.

In addition to that, why you would have to plan on significant start-up losses for the first year.

Q How long—or is that your estimate of how long it would take a plant like that to become profitable?

A I would think if it was someone in the industry adding production it would take close to a year. I would think if it was a totally new entrant where neither the sellers of the fed cattle or the buyers of meat knew about him, it would probably take a couple of years.

Q Why would it take longer for that person that hadn't been in the industry?

A Well, if we add a plant or if Excel adds a plant, IBP adds a plant, they know the customers, the customers

assume that the packers' quality control will take care of the product problems. They can steal from their own plants to get supervision and management, whereas a totally new entry, first of all, he has [Tr. p. 107] quality problems and, second of all, even after he solved them, why the buyers of the meat probably don't think he solved them for a while, and it just takes longer to be the new guy on the block.

Q That's a customer acceptance sort of problem?

A Yes.

Q You have indicated then about how long you think it would take a new plant once it started operating to get profitable. How long do you think it would take a, assuming you started today, to run the first cattle through that—through the plant that you have described—how long to build and get going?

A Well, in addition to that three to six months lead time, I would think it would take at least a year of actual construction before you tried to process your first head.

Q I suppose that there is some recruitment of new workers and training that you have to go through?

A Oh, yes. And that's part of those initial first-year losses. Not only do you have a sales problem, but you have an inefficient work force, and normally when people start up plants everything that can go wrong does.

Q You have given us a couple of examples of recently constructed plants. You have used IBP at Finney County and Excel at what? Dodge City?

A Yes.

Q Do you have an estimate based upon your knowledge, experience [Tr. p. 108] or anything publicly reported of the approximate costs of those plants, or either of them?

A Well, the industry—the industry in the trade press call them both $100 million plants each.

Q When was the last time you can recall a slaughter-only plant having been built?

A Well, if you disregard the fact that Dodge City was built over a two-stage period, it was built was a slaughter-only plant, but I assume they figured they would add a fab to it, if you ignore that, frankly it might be the Fort Morgan plant or it would go back over ten years I think for a slaughter-only plant that I know about.

Q Let me ask you this, Mr. Monfort. Would you compare what I will describe barriers to entry or ease of entry today with the same kind of barriers or ease of entry at the time your company went into the packing plant business? Would you make that comparison?

A Yes. That was 1960. As I say at that—as I said earlier, at that time we were allowed to enter the business because the people that had the business, the Swift and the Armour did not move their plants out to where the cattle were. They did not modernize their plants. They were relatively easy competition compared to what exists today.

The business was a carcass business. You bought cattle, you processed them, you sold them as carcasses.

[Tr. p. 109]

Q What was different then that doesn't exist today or vice-versa?

A Well, today we are talking about boxed beef which is a far more complicated quality-type product. It's more complicated to train people, to almost in every way it's more complicated.

A choice carcass of beef used to be pretty well shippable to anyone in the country. If you were cheaper than someone else you could almost immediately get your marketing established. Whereas with the boxes you have to develop

a name to where the large buyers will accept your product at basically the same price level as competitor's products.

Back then, why rendering was very simple. You had stationary batch cookers. You would buy one or you would buy two, and they cost $10,000 apiece. Today you buy a continuous rendering system that costs a million dollars. You add a couple of them. You add a million dollars in gelatin, bone equipment if you are going to be efficient.

Back then, why you just assumed that the city would handle your sewage or that it would be dumped in the river. Today you have to have very, very careful complex ways of handling your sewage.

Q You are telling me it's a lot harder to get in the market today?

A Yes, sir.

Q Okay. Let me ask about the expansion of existing plants. [Tr. p. 110] Now that's something that Monfort did at Grand Island, did it not?

A Yes.

Q When did you buy—when and what did you buy at Grand Island?

A We bought an ex-Swift plant that had been built in 1965, and we bought that in 1979, I believe.

Q What did you pay for it?

A We paid $5.1 million.

Q What did you do to it, and what did it cost?

A It was strictly a slaughter plant. We built the processing onto it. That cost in excess of $10 million. We have since gone back and remodeled the slaughter part that we bought. We've had to add to the rendering significantly. We've had to add to the sewage. We have totally changed

the sewage treatment on it. Cash-wise, why we have spent, including purchase price, over $25 million on it.

Q Let me ask you, can you identify any significant new entrants into the business in the recent past?

A If you exclude the acquisitions, i.e., the Land O' Lakes acquisition of Spencer, throw them out, the only really new one that I can think of of any size at all is an outfit called Val-Agri.

Q Where is that located?

A Val-Agri, I believe their headquarters is Wichita.

[Tr. p. 111]

Q How many plants do they have, and when did they come into the business?

A They have bought two plants, one in Garden City, Kansas, and one in Amarillo, Texas, and I think they started production within the last year.

Q Are those both fab/slaughter plants, combined plants?

A I think primarily slaughter, some fab. I know they are currently adding to the fab capacity and some cooler capacity, et cetera.

Q Is there any publicly available data as to what it cost that company to go into the business?

A Not that I know of.

Q Are there any circumstances with respect to Val-Agri that you regard as perhaps unique or unusual?

A Well, Val-Agri is owned by Ed Cox who is in the 500—$400 million category in Forbes issue of personal wealth, so I think he can afford it.

Q Can you comment just briefly on the differences, if there are any, in the costs and efficiency and so forth

between what I will just call old and new plants? Perhaps if you can think of any example that would be helpful.

A Well, as every year goes by, there's fewer and fewer of the old plants. Are you talking about a remodeled plant like—

Q I am talking about—I guess if you were going to go into the business as a new entrant, would you look for an old plant [Tr. p. 112] like you did, for example, or an older plant as you did at Grand Island, or would you build a new plant of the kind that you have just described?

A Well, we've never been able to build the Dodge City/Finney County type plants.

Q Why not?

A Well, they cost $100 million. We've never had that. I really don't know whether there is enough increased efficiency in those plants to make them more worth the money than our Grand Island plant. I would think that our Grand Island plant, although it undoubtedly is not as efficient as either one of those two plants, probably is close enough in efficiency to where 25 million I would rather have it than there is at 100 million, but I don't know.

Q Can you think—putting aside for a minute the Spencer plants that we are talking about in the lawsuit—are you aware of any other plants that you would describe as reasonably modern or reasonably efficient that could be acquired and either operated or expanded to operate the kind of facility you think would be necessary in today's market?

A Basically I cannot. Location is a problem. There has been several plants for sale in Omaha.

THE COURT: Your answer is no; is that correct, Mr. Monfort?

THE WITNESS: Yes, sir.

* * * *

[Tr. p. 113]

Q Can you or do you believe there is any reasonable possibility of the retail chains or the independent fabricators that we have talked about previously either buying or expanding their capacity to any significant degree in the future, Mr. Monfort?

A No.

Q Now a couple of quick questions on whether or not you believe, in addition to the economies that scale single plant that you described sometime ago, whether there would be additional economies associated with a multi-plant operation as opposed to a single-plant operation?

A I am sure there is significant economies. Our costs went down when we were operating—now that we are operating two plants—sales expense, a number of things you do reduce costs. In addition, there is the chance that plants in a certain area may be making money while they are losing money in another area.

Q Why would that occur?

A Well, because of the market conditions, cattle markets higher in Texas than it is in Nebraska. Right now it's higher in Nebraska, and I'm sure the southern plants are doing better than the northern ones.

Q Is there any advantage transportation cost-wise to having more than one plant?

[Tr. p. 114]

Well, yeah. When you buy cattle you can move them to the closest plant, and there is probably an ease of servicing customers in certain areas. Most of our—we try

and sell a lot of our Greeley meat to the west coast and Nebraska meat to the east coast.

Q Okay. Now you have heard counsel for Excel in his opening statement describe the pricing mechanism on both sides of your industry, that is the supply side and the selling side as complex. And I wonder if you would describe briefly for the Court how prices are established, and let's start out with the buying side or the procurement side, if you would, please.

A Well, basically you start out with the fact that there is a market, a market price, and that you have to believe, as I do, that it's apt to change every day, or maybe several times within the day. Basically what we do is within that market price, considering it, why we would try and buy fed cattle for a certain dress price on a carcass basis.

Today our orders might be 97 cents a pound on a dressed basis. If sellers, i.e., the cattle feeder, wants to sell them on a live basis, why then our buyer has to translate that 97 cents per pound into, say, a 61 cents a pound live-weight basis. If there are a large number of off spec cattle, Yield Grade 4s that we have to sell out to someone else at a discount, our buyer is expected to discount that price.

If there's a big spread between choice and ungraded [Tr. p. 115] cattle, ungraded being basically goods, why he is expected to discount that price for those. They can do it, and it's—

Q Who are the people that are making those translations? Are those your buyers?

A Those are our buyers. They do it basically on orders from our corporate office.

Q And is that done on a daily basis?

A It's done on a daily basis. It can change during the day, too.

Q Why is the educational level that's required of the buyers, the cattle buyers that you have in the field ordered to accomplish this buying process?

A We may have one or two that have college degrees, but basically it's a question of whether they can judge cattle, whether they have certain amount of experience. My son started running that operation in Grand Island when he was 26 years old.

Q Did he do it successfully?

A I had to promote him, so I guess either that or nepotism was working, but I thought he was successful, yes.

Q To what extent do you regard the pricing mechanism on the procurement side to be complex?

A Well, it may seem complex to other people. I grew up with it. And our cattle buyers, I don't think, consider it complex. I frankly don't consider it at all complex.

Q Let's turn to the other side, the selling side. The selling [Tr. p. 116] of product that you fabricate in your plants. Would you just very briefly describe how those pricing—how that pricing mechanism works and how those pricing decisions are made?

A Well, basically you—a carcass will end up being 18 or 20 different items. We have a percentage factor that that carcass will, for instance, make four percent of strips, say, the strip price—

Q That is a steak, isn't it?

A Yes. Strip price is—yes—is $1.80. Chuck price is another price. You multiply those percentages times the price and you come out with a cutout. This used to be a fairly tedious-type thing, to see if your cutout, i.e. what you were getting, equaled or exceeded what you were paying for cattle.

Anymore all of those factors are on a computer. It's very easy, even if you didn't have yesterday's historical prices, you could start playing games with them and come out with a cutout that would provide whatever results you desired.

Q What kind of a sales staff do you have selling product out of your plants? How many people?

A I think we have about eight or nine.

Q What is the education or special training required for those people?

A Oh, I would think a couple of them are college graduates, so there is no college course that teaches this. They are on the phone. They talk to customers. They price products. They [Tr. p. 117] try and get as much for it as they can, but they deal with a price list that is set up as is by our sales manager who has figured out whether we have a good or a bad cutout.

Q Let me move on, Mr. Monfort, and talk about your perceptions as to the future of the industry that you have been describing this morning. First of all, do you have a view as to what the future growth, if any, will be of the beef industry as you have described it?

A Basically I view it—and I think most economists view it—as a mature industry. An industry that is not going to grow. We are a unique industry as in the fact that decisions are made by different people. The rancher makes a decision on how many feeder cows to keep, to feed or how many cattle to feed, et cetera, but the industry is not profitable enough for the rancher, the initial producer to have any incentive to try and produce more cattle.

I do not view the demand situations improving in such a way to where the price level would move up to help that rancher. If anything, why I think some of the health-type things that we see frequently in the press may keep

pressure on the consumption, so I would say it's a mature industry.

Q You have testified on your deposition taken in this case, I think, that you believe this industry to be essentially competitive at the present time; is that correct?

A Yes, sir.

[Tr. p. 118]

Q And is that your belief?

A Yes.

Q I want to ask you, Mr. Monfort, what you believe the effect of the acquisition that brings us here today, the acquisition by Excel of the three Spencer beef plants, will have on two things, really; one, on competition or the competitive process in the industry as you have described that industry, and, secondly, on your own company.

A In essence, what I believe will happen, if this acquisition goes through, I think this acquisition would in effect make Excel/Spencer very near to the same size as IBP. I think both companies would then do everything they can or could to become number one dominant within the industry. To fight for market share.

In so fighting for market share, they can change their percentages of the meat business relatively easy without adding much in bricks or mortar.

Suppose, for instance, that between them on normal operations they controlled 70 percent of the business as I have defined it. And suppose that they were both vying for market shares. The mere act of adding consistent Saturdays to their production to give them market share would run that 70 percent up to something over 80 percent. Obviously that would squeeze a whole bunch of folks out of the industry.

I believe that both companies have both the attitude, [Tr. p. 119] the ability and the financial strength to engage in such a program. Not collusive. But to engage in such a program that would in effect be short-term positive to consumers, the cattle people, but I believe then you have to look at the second phase of such a happening.

At a point when there is little significant competition left for these people, I would then presume that they would get tired of that type of problem.

Q Better describe the problem you are describing.

A The problem of operating with little or no profits, perhaps losses, and that then they would have the wherewithal to very easily increase margins, and in the long run be detrimental to consumers, and then cattle industry.

How does this affect me? I guess as long as I'm not one of those that's squeezed out of the business, it probably long-term doesn't affect me. I would have severe question whether in this kind of scenario we, Monfort of Colorado, could compete with Excel/Spencer owned by Cargill or IBP owned by Occidental.

Q To have occur what you have just described, Mr. Monfort, would it in your view be necessary for Excel and IBP to have any agreement between themselves?

A No, it wouldn't be at all necessary.

Q Why is that?

A Well, the fight for market share can be simply done by both [Tr. p. 120] of them making decisions that they do want X percent of the market. That IBP decides they want to stay number one, Excel decides they want to be number one, they simply increase their production by working Saturdays, by being very aggressive in the marketplace, and the happening occurs without them ever talking to each other.

Q Do you believe that would occur if this acquisition is approved?

A I most certainly do. That's why I am here today.

Q You have referred in your testimony to margins. You did just a minute ago. Do you recall that?

A Yes.

Q What does the use of the word "margin" mean to you, or what does it mean in the industry?

A Well, one of the problems other people have understanding our industry is price versus margin. For example, in the last year we've had live fed cattle prices go from about a year ago they were 55 cents a pound, and in April they got up to 72 or 73 cents a pound. They are now back around 60 cents a pound.

Probably the packing segment of the industry has not profited by that movement. As prices went up and as they have come down, we have adjusted our selling prices to fit those live cattle prices.

Basically the margin which I talk about doesn't deal with price level. It deals simply with the fact that if we [Tr. p. 121] spent $600 for a head of cattle, we normally talk pounds, but $600 for a head of cattle, and if the cost to process is $65, that's $665.

If our sales are $675 we have a $10 profit. We have about a one and a half percent margin. So to double the margin on our sales side we really don't have to change the price level hardly at all to double the margin in that instance.

[Tr. p. 122]

Q All other things being equal?

A All other things being equal, all we have to do is sell the items for a total of $685 instead of $675.

Q And you have doubled your profit?

A You've doubled your profit. It works the other way around.

Q On the way down?

A Yes, same way.

Q I am not sure, but you may very well have answered this, but would you tell me how you believe this proposed acquisition would affect the margins of Monfort and the other competition, other competitors?

A I think as this fight for market share goes on, that it would adversely affect our margins, perhaps to such a degree that we would be forced out of business.

Q And how much of a change in price would it take to significantly affect the margins of you and the others in the industry?

A If everything else is equal it could be one and a half to two percent change that would throw us in prices at either end.

Q Buying price or selling price?

A Yes. That would throw us away from that $8 per head profit I said we had last year in the packing business to an $8 or $9 per head loss.

* * * *

[Tr. p. 123]

CROSS-EXAMINATION

BY MR. HANLEY:

Q Mr. Monfort, did I understand you to say that for the fiscal year ending September 1983 the annual sales of Monfort of Colorado were $1,400,000,000?

A We haven't released that publicly, but that will be fairly close, yes.

Q Monfort of Colorado was the fourth largest packing company in 1981 based on the number of cattle slaughtered?

A I believe so.

Q Monfort of Colorado procures cattle and operates feedlots [Tr. p. 124] and feeds cattle, correct?

A Yes.

Q And it also slaughters fed cattle?

A Yes.

Q And it also fabricates fed cattle?

A Yes.

Q And at least as of the end of 1981 it is accurate to say that you believe that Monfort was able to compete on at least equal terms with its competition in the industry with respect to price and the quality of its products?

A Yes.

Q Let me ask you about this 8/10ths of one percent that you mentioned. You are talking about profit on sales; is that correct?

A Yes, and that was at the packing level.

Q You are not talking about return on investment?

A No.

Q Well, any company, sir, that buys a high value product such as cattle, and only somewhat increases the value before it sells its product will have a narrow return on sales; is that right?

A That tends to follow, yes.

Q But the question of whether someone might find the business profitable or unprofitable to enter is going to be based on return—on return on investment, correct?

[Tr. p. 125]

A That would be one of the factors for sure.

Q I take it you would like to increase Monfort's present share of the market?

A Yes. I am normal.

Q That's what you are in business for, right?

A Yes.

Q In 1981 Monfort of Colorado had ten major competitors in the meat packing fabricating business?

A That's probably true.

Q That would include at least IBP, Excel, Spencer, Swift, Morrell, Dubuque or National/Idle Wilde, Sterling, Colorado Beef, Armour, Pepper Packing Company. Any others?

A I think that would be a pretty good list. You never know quite where to start and end on those.

Q There are some smaller companies and plants like Litvak in the beef packing business?

A Yes.

Q And some of them are quite successful?

A Some of them are staying in business.

Q Well, some of them stayed in business a long time, haven't they, sir?

A Yes, sir.

Q Since 1981 Armour has been phasing out of the meat business and Morell probably as well, correct?

A Yes.

[Tr. p. 126]

Q But I think you have mentioned there has been at least one strong new entrant since 1981?

A Yes.

Q And that's Val-Agri?

A Yes.

Q And it certainly is a competitor of Monfort's today?

A Yes. It will be a better one.

Q Now I am a little confused about your—the price of entry. Would you assume with me for just a minute, sir, a company decided to enter the beef fabricating business, and after checking out the governmental requirements, regulations that you mentioned and finding a location, a compatible location, how long would it take it to get into business?

A Are you talking fabrication only?

Q No. Into the slaughter/fabrication business.

A Well, I think I said that it would probably take it a year to construct the facility, if you are talking about new construction.

Q Probably take a year to build the facility?

A Yes.

Q Is it accurate to say that there is no non-purchasable technology that a new entrant would have to try to acquire if he were to enter the beef business?

A I presume that's—technologically I'm sure that it is true.

[Tr. p. 127]

Q Yes, sir. Like getting into the computer business or something. There is no proprietary technology that he would have to have a difficult time acquiring?

A I don't know of anything that's covered by patents that would keep people out.

Q Or any other proprietary—

A That's true.

Q Or difficulty to obtain technology?

A I think that's true.

Q Is it accurate to state, Mr. Monfort, that all beef that is produced will be consumed, and the pricing mechanism is what balances the production and the consumption?

A Yes.

Q So if beef prices increased and consumers switched to pork, poultry and seafood, that would be a necessary mechanism to balance the supply of beef and the consumption of beef?

A Basically that's true, yes.

Q Mr. Monfort, there is competition in your market today, correct?

A Oh, yes.

Q Good tough competition?

A Yes, sir.

Q And you certainly believe that your company is able to compete on at least equal terms with its competition in the industry with respect to the price and the quality of its product?

[Tr. p. 128]

A Yes.

Q Your company bought a plant in 1979 from Swift. In a little more than a year that plant had increased slaughter capacity from 700 head to 2200 head a day. At that former Swift plant you added a fabrication operation, and the entire price was $8 million; isn't that correct?

A No.

Q In 1982 Monfort began a major construction and renovation project at its beef packing and fabricating plant at Grand Island, Nebraska; is that correct?

A Yes.

Q And it's now approximately 90 percent completed?

A Yes.

Q And that's about an $8 million project?

A That one is, but I didn't think that was the one you were talking about before.

Q The project referring to the construction and renovation project at Grand Island was estimated in 1982, according to your 10-K for the SEC for the fiscal year ending August 28th, 1982, was estimated to cost a total of 6.5 million, correct?

A Yes. And that ended up being closer to an $8 million project. If that was the one you were talking about originally, I misspoke when I said no.

Q This project at Grand Island has, or will add about 70,000 square feet to your current 220,000 square foot plant?

[Tr. p. 129]

A Yes.

Q And the construction project at your Grand Island plant will increase your daily production capacity about 15 percent to 3700 to 3800 head of cattle a day?

A Yes.

Q As of the end of 1982, the fiscal year that you have just completed, Monfort and two other packers ranked as the third largest beef packers based on the number of head slaughtered, correct?

A What year was that?

Q This last year.

A Calendar '82?

Q Your last fiscal year which I understand ended in September.

A Okay. The last one that you would have a report on would be over a year ago, I think, and by now I have forgotten the question. I am sorry.

Q I would just ask, as of that time Monfort and two other packers ranked as the third largest beef packers based on the number of head slaughtered?

A I would imagine that's true since Spencer's Schuyler plant had been down part of that year.

Q The other two you contend were Spencer and SIPCO?

A Yes.

Q With Spencer's Schuyler plant down, you are larger than Spencer?

[Tr. p. 130]

A Currently, yes.

Q And your information about the relative size of your competitors is based on general industry knowledge?

A I believe so.

Q It's not based on any government survey or studies?

A I don't believe so.

Q Now I think we have got this clear, but I just want to make 100 percent sure. In this case, sir, you are not contending, are you, that after the merger of Excel and Spencer, IBP and Excel would enter into some kind of collusive agreement to depress the price of cattle?

A No, you have that clear.

Q And on the basis of past historical performance in the beef industry, would you say that chances that IBP and Excel would enter into some kind of collusive agreement to depress prices are very unlikely?

A I would think it's very unlikely. I have no reason to think they would.

Q And the danger—your danger to you from competition is far more than danger of collusion?

A I believe so.

Q Just to make sure, you feel danger from IBP and Excel competing with each other is far more of a danger to you than their colluding with each other?

A I do not feel that they would collude with each other. I [Tr. p. 131] feel they would each one try to be dominant, and that that would put all who are not similarly situated in some danger, yes.

Q What you are worried about is that Excel and IBP would each seek aggressively to increase its share of the market by cutting their profit margins to an extent where others in the market without the resources of IBP and Excel would be forced out of business; is that correct?

A Yes.

Q To your knowledge in the market IBP and Excel are presently each seeking aggressively to increase their market shares, are they not?

A Yes.

Q And isn't it true that over the last 20 years in the beef industry, as new entrants came into the market with more modern plants and improved labor rates and with better managers operating the plants, the more efficient plants stayed in business and the less efficient plants were driven out?

A That has been what has happened, yes.

Q Who were these new entrants in the last 20 years?

A Last 20 years? If you go back a few more, why you get to the IBPs, the Excels, ourselves, et cetera.

Q Mr. Monfort, in your answer to our Defendants' Interrogatory Number 9 of the first set of our interrogatories, you said in part that market dominance could be employed to increase the [Tr. p. 132] procurement price of grain-fed steers and heifers while depressing packer boxed beef prices.

You said, "The resulting price cost squeeze could severely injure the smaller competitors of IBP and Excel including Monfort," did you not?

A Yes.

Q Then when we asked you in Defendants' Interrogatory Number 20 of the second set of interrogatories if you knew of any instances in which a price cost squeeze of the sort referred to in your answer to our Interrogatory Number 9 of the first set, you answered, "The price costs squeeze referred to in the answer to Interrogatory 9, first set, has existed throughout the industry for the last 20 years. Monfort believes that pricing practices of this sort have contributed significantly to the failure of a number of beef packers in recent years."

That was your answer, correct, sir?

A Yes, sir.

Q And it was given under oath?

A Oh, yes.

Q And you signed those interrogatory answers?

A Yes.

Q When we asked in Defendants' Interrogatory 21 of the second set where you contended that any relevant market is currently functioning in a non-competitive manner, you responded in your answer to Interrogatory 21 of Defendants' second set [Tr. p. 133] "No." Was that your response?

A Yes, I think that's right.

Q Now by price squeeze did you mean a narrowing of the margin or profit in each market?

A Narrowing of the margin, yes.

Q And these profit narrowing results have been the result of competition, haven't they?

A Yes, sir.

Q It is true, is it not, Mr. Monfort, that the last 20 years in the beef packing industry has seen the entrance into that market of what we've heard to refer to today as the new breed of beef packers?

A Yes.

Q And that new breed of entrants into the market got into the market and stayed there by efficiency in production, and they basically took the market away from the old-line beef producers?

A Yes, sir. They did it by building plants, not by acquiring plants.

Q And currently the relevant markets which you have defined in this case are all currently functioning in a competitive fashion?

A Yes.

Q So this price squeeze that's been going on for 20 years has been competitive, not non-competitive?

A Yes.

[Tr. p. 134]

Q And inefficient producers have been squeezed out by the more efficient producers, correct?

A Yes. And maybe some efficient producers have been squeezed out, too.

* * * *

[Tr. p. 141]

BY MR. HANLEY:

Q You do buy and sell from time to time on a futures market basis?

A Yes.

Q In fact, you do that all the time, right?

[Tr. p. 142]

A No. It happens sometimes. Sometimes. It is not happening now.

Q Okay. Would you tell us how that's done. I didn't quite follow your testimony on direct examination.

A Well, basically someone could have some cattle they want to sell for next February. If our person in charge of that says that we at that time will buy cattle at par

with the February futures market, why then our buyers can bid feeders, whatever the price of February futures are, with a formula taking them to a beef price for those cattle that are going to be fat in February.

Q And that seller can decide at any time up to the whatever termination date you use that he is going to sell?

A Yes.

Q And in order to protect yourself, you also had your bets on that future market, don't you?

A Yes. If we buy the cattle, why then we don't want the added risk, so we will sell the equivalent futures contracts.

Q I find that fairly complicated, do you?

A No, but it's because we deal with it.

Q You have been doing it for a long time. You know that Excel buys and sells from time to time on a futures market basis?

A Yes, I have been told that.

Q And have you been told that IBP does not purchase cattle on any forward contracting basis based on future prices?

[Tr. p. 143]

A I don't know whether I have ever been told they don't. I have never been told they do, and I assume they don't.

Q Assuming you have a plant—and I am sure you do—that would permit it, is it accurate to say that double-shifting your work force would practically double the amount of your production?

A Yes.

Q And do you believe shifting decreases your cost per unit somewhere around 15 percent?

A I would think that's about true.

Q And to double-shift all you have to do is to add a little additional storage facility; is that correct?

A Yes, plus train a work force, plus have the market, plus have the cattle available.

Q But it doesn't require substantial changes in your plant configuration?

A Not substantial compared to building the same size capacity plant.

Q Is it true that these vacuum packing machines that you use to box cattle new cost a couple of hundred—what? Couple hundred thousand or a hundred thousand?

A I think closer to a hundred thousand.

Q About a hundred thousand. And that a two-year-old one is only worth about 5000? [sic]

A Well, yeah, but that's—they are totally different [Tr. p. 144] machines with different capacities, so the ones they are selling now, none of them are two years old, so we don't know what they are worth when they are two years old.

Q Would you agree with me, so that we don't go through the whole process again, would you agree with me that on the selling side the configuration of prices and the methods of sales makes sales of beef highly complex transactions?

A Well, you know, I think it's complex to those that don't understand it. It's even a little more complex to me because we use computers now than it is to some other areas of our operation, but it's complex, but understandable.

* * * *

Q Is it true that labor costs in the beef fabricating business have decreased substantially in the last two or three years?

[Tr. p. 145]

A Are you talking on average or where?

Q I just say if you are in the business today and somebody asks you, Mr. Monfort, isn't it true that beef costs in the—that labor costs in the beef fabricating business have decreased substantially in the last two or three years, your answer would be yes?

A I would say industry-wide, yes. For instance, our cost in Grand Island on the other side have gone up in the last two or three years.

Q You would agree that the beef packing industry is one that may be one of the most competitive and efficient in the world?

A Yes.

Q Monfort feeds a lot of cattle each year?

A Yes.

Q At any one time your company owns a lot of feed cattle, correct?

A Most people would consider it a lot, yes.

Q If the price of fed cattle increases, the value of your fed cattle also increases, correct?

A Yes.

Q So if IBP and Excel were able to raise the price of fed cattle in the market, the value of your assets would increase, would it not?

A While that happened, yes.

Q You did add substantial capacity to your Grand Island [Tr. p. 146] plant in recent years?

A Yes.

Q And you did that in part to increase the efficiency of your operation and to increase the level of your production of boxed beef?

A Yes.

Q Monfort does have an efficient operation?

A I think so and hope so.

Q And this Grand Island substantial capacity operation did increase the level of your production?

A Could you restate that?

Q Sure. By this, the work that you did on this plant, you did increase the level of your production?

A This most recent work that we started with?

Q Yes, sir.

A Yes. The 15 percent, yes.

Q Yes, sir. So one effect of the increase in your capacity is to put competitive pressure on your smaller, less efficient competitors, correct?

A I presume.

Q Well, take me through this. Your Greeley plant was shut down for some time?

A Yes. For two years.

Q And while it was shut down, other firms were able to sell to customers to whom the Greeley plant had sold prior to the [Tr. p. 147] time that it shut down?

A Yes.

Q Would you say that when the Greeley plant reopened, it was more efficient than some of the smaller competitors?

A Not when it first reopened. It got that way, but—

Q And when it got that way, you recaptured from those smaller competitors the sales that you lost while your plant was closed?

A Well, I [sic] may not have been exactly the same sales. It may have been different sales, but we ended up selling the beef, yes.

Q You recaptured it from some of the companies whose business you lost while the plant was closed, you recaptured their business when the plant was opened?

A Well, I don't think you can say we have lost the meat business to smaller competitors. We may have lost it to bigger competitors, and when we recaptured it, we recaptured some and we got some new business, but we sold all the beef we produce after we opened.

Q It's true, is it not, Mr. Monfort, that until 1982 Spencer's Schuyler facility competed directly with Monfort in purchasing fed cattle in Nebraska?

A Yes.

Q And in December of 1982 the Schuyler facility was closed?

A Yes.

Q And it's been closed since?

[Tr. p. 148]

A Yes.

Q And since December of 1982 when the Schuyler plant closed, Monfort has engaged in its business, in the absence

of Schuyler's competition in fed cattle procurement and in beef production?

A That Schuyler plant, yes, although Land O' Lakes still buys cattle in our area.

Q And the Schuyler plant is only 60 miles from Monfort's Grand Island plant?

A I believe so.

Q And I think we learned on direct examination that had you expressed some interest to representatives of Spencer of acquiring the Schuyler plant?

A Yes.

Q And you had one or more telephone conversations this year with Mr. Ronald Dudley and Mr. Hofstad of Spencer?

A Yes.

Q And during these conversations you were asked if you were interested in purchasing all three of Spencer's plants, and you said you might be interested in purchasing one or two plants?

A Well, I think just one of two.

Q One of two plants?

A Yes.

Q And you told them that you would be interested in either Schuyler or the Oakland plant?

[Tr. p. 149]

A Told them I might be, yes.

Q And you told Mr. Dudley in your conversation that you would rather have the Schuyler plant shut down?

A I may well have said that jokingly, yes.

Q Was there anything to indicate from the other end of the wire that Mr. Dudley thought you were joking?

A No. I've never met Mr. Dudley, so I don't know whether he dreamt I was joking or not. I frankly don't remember saying it, but I may have.

Q Assuming the Spencer Schuyler plant could be kept closed or would be kept closed as it has been closed, that would be competitively beneficial to Monfort?

A I guess it would be. I don't believe that will happen, but I guess it would be, yes.

Q I think you testified that independent fabricators are not long-term competitors of Monfort, and that your only long-term competitors are integrated slaughterer/febricators [sic]; is that correct?

A I believe that to be true.

Q Then independent fabricators are then current as opposed to long-term competitors of Monfort, aren't they?

A Yes, I think I may have mitigated that a little to say that they may, long-term-wise have a place to play in out of—in cattle that do not fit our specs, et cetera.

Q I think when you were talking about your conversations with [Tr. p. 150] the Land O' Lakes people, you mentioned that there was another bidder that Land O' Lakes was afraid would raise antitrust problems. That wasn't Excel, was it?

A No, No. I presume what he was telling me, the bid he had was probably the Excel bid, and probably the other bidder was someone else.

Q When you were talking about Val-Agri and its entry into the market just recently, has it had the customer acceptance problems that you have testified to in the hypothetical version of a new entrant?

A I really don't know. I've heard of some product problems they have had. They may have mitigated that problem by hiring eight or ten people from the Defendants' company here.

Q This hundred million dollar price tag that you placed on entry, is that—are you saying it costs a hundred—it would cost a hundred million dollars to obtain a 1500-head per day state of the art slaughter/fabrication plant?

A No, I don't think I ever said that.

Q That would be way too high, wouldn't it?

A I think that would be too high, yes.

Q What figure?

A I think hypothetically we talked about 40 million in capital construction cost, and we talked about—what? 16 or 17 million in inventory and receivables, and I think that's—as I said, there would be losses the first year. I think that's [Tr. p. 151] the closest I got to it.

Q That's how you got up to that hundred million figure?

A I don't remember using a hundred million dollar figure except in the cost of Dodge City and Finney County and other people know those costs better than I do.

Q The basis for all these plant cost figures that you are using here, the basis of that is the trade press?

A I think trade press, plus everyone in this industry seems to gossip, and everyone seems to know everyone else's business, so—

* * * *

Q For this squeeze that you are concerned about to take place because of the acquisition, isn't it true that Excel and IBP would have to join their respective market shares?

A Well, I don't think necessarily true. Do you want me to explain?

Q No. I wondered if—my problem is each one of them has their own independent market share, and in order to have this effect that you are concerned about, they would have to—those market shares somehow would have to be added together to increase your concern about being squeezed out of the market?

[Tr. p. 152]

A I think both of them would aggressively pursue my market share, and so whether they wanted to join or not, the two would in effect accomplish the same thing as joining.

Q Well, is there anything to prevent the three entities from doing that?

A Am I included or is Spencer included?

Q I am including Spencer, Excel and IBP and you. You are all going to be in there fighting for your market share, aren't you?

A Well, sure, we all do. What this does is rather quickly get someone who has been number two about half the size of IBP awful close to the size of IBP, and, as I said, they have everything I know about, Cargill and Excel, they would have the aggressiveness to try and be number one.

Q Well, Excel and IBP are competing today for market share, correct?

A Yes.

Q Well, then, the acquisition really doesn't make any difference, does it?

A Well, I think it makes a difference, obviously.

Q You testified that fed cattle are cattle fed from 130 to 140 days. You have also testified that you do not

slaughter any non-fed cattle. Does Monfort ever slaughter cattle fed for fewer than 130 to 140 days?

A Yes. Those were meant to be average figures. I would say [Tr. p. 153] an effective minimum number of days would be closer to 90 to 100.

Q So that your definition of fed cattle is not completely clear, is it, Mr. Monfort?

A Well, it depends upon whether you are talking about a minimum or an average of which was what I was talking about. I would say that the cattle we need this year will probably average 130 to 140 days on feed. Some may be fed as little as 90 days if they are very fleshy and have been on some sort of backgrounding feed that makes that feasible, and some of them, if they are very light, may be fed as long as 180 days, and that may be more than you wanted to know.

Q When total U.S. cattle slaughter exceeds 130,000 or 140,000 head a day, do your margins go down?

A Not necessarily.

Q Did Val-Agri's entry into the market have an effect on prices or margins?

A Well, they haven't been as good since they entered it, but I really don't think they are the reason for that.

Q You testified that retail butchering involves diseconomies. Isn't it true that there are also some economies?

A Well, I think I testified if the owner doesn't have anything else to do with his labor, that would surely be one economy, and I don't know what other economy there might be.

Q Isn't it true that retail butchering has an advantage in [Tr. p. 154] that care can be taken to extract more meat from a given carcass than is possible with the assembly line fabrication of a packing plant?

A I don't believe so. If they can save more meat than we can where we have all the specialists, equipment, et cetera, why we're dead. We are operating badly and they are operating well.

Q You are doing it on a mass production basis, correct?

A No. We are doing it on a mass production basis, but each person has not a mass production job. He has one job, he or she, and theoretically I would think we save more meat than they would at the retail market.

Q You testified that only one purchaser in a hundred asks you about possibly buying carcass beef rather than boxed beef. Isn't it true that a great many purchasers pay attention to the reported prices of carcass beef?

A Oh, yes. Everyone does in the industry.

Q And isn't it true that many purchasers will resist paying higher prices for boxed beef if the price of carcass beef decreases?

A Yes. They may even reduce—resist paying steady prices if it reduces.

Q I believe you testified—and correct me if I am wrong—that the price of ground beef is responsive to the price of hogs?

[Tr. p. 155]

A No. I just said that maybe one of the things that may influence this price.

Q Well, so pork products compete with ground beef; is that correct?

A I think pork products, yes, they do. Not directly, but they do—are competitive.

Q What of all of the beef products that consumers can buy, what percentage if you know does ground beef comprise?

A Of all the beef products? What does ground—

Q That consumers buy, consume, what percentage would you say?

A I frankly don't know.

Q Would you think it's as high as 40 percent?

A I would think that might be fairly close because you have to use all our trimmings. You have to use all the cow and bull slaughter, and then you have to use the imported beef for that, and that may well add up to 40 percent.

Q So you are excluding some 40 percent of the beef products in this country from the market that you allege in this case; is that correct?

A Well, we are saying that is not the relevant market for this case, yes.

Q You are excluding that 40 percent from the production of commercial beef market?

A We are excluding it from what we consider the relevant market for this case.

[Tr. p. 156]

Q And it is correct, isn't it, Mr. Monfort, that you testified that retailers like Winn Dixie who fabricate some of their own beef are in effect competitors of Monfort?

A Oh, I don't remember exactly what I testified. I know they are customers, and from the fact that they don't buy as much boxed beef from us as they would if they didn't fabricate their own, I guess theoretically they are competitors, but they don't sell to our customers. They aren't the normal type of competitor.

Q But they compete, as you just pointed out, correct?

A Well, I don't know how you define competition in that regard. I do not view them as competitors.

Q Let's get off of that, then, and I will ask another question. You testified that you regard Spencer's Schuyler and Oakland plants as relatively modern and efficient; is that correct?

A From what I know, yes.

Q And you said that they should make money for somebody?

A I would assume they would, yes.

* * * *

[Tr. p. 157]

REDIRECT EXAMINATION

BY MR. McCLEARN:

Q You were asked a question, Mr. Monfort, about the cost of new vacuum pack machine, and I think you said—did you say it cost more than $100,000?

A Yes.

Q And do you have any idea how many vacuum pack machines any one of your plants has?

A Well, this particular capacity machine, I believe four of them would handle our entire Grand Island production. Greeley, because it is a faster production, would probably take six. But we only have one of those in Greeley, I believe, and three in Grand Island.

Q You said in response to a question from Mr. Hanley, and he referred to your deposition, you in effect acknowledge the sales of beef, or you expressed a belief that sales of beef were highly complex transactions, and I think you used those words in your deposition, and then you went on and said that in order to save Mr. Hanley time, as he had asked you to do, without being redundant to anything

that you said before, would you simply comment on the degree to which you regard those sales as highly complex?

* * * *

[Tr. p. 158]

Q Would you explain to the Court the degree to which you believe the sales of beef constitutes a highly complex transaction?

A Well, as I say, you are selling a number of different items, different weights, different grades to a number of different customers. Every time I try and explain this to attorneys, to economists, to friends they think it's very complex and confusing.

Those people that grow up in the industry basically understand that type of sales. Our first sales manager, when asked how he figured out how to price an item, and we were very new in the boxed beef business, Maurice Feldman, someone would say how do you come up with a price and he says—

* * * *

A He says well, this really gets to it, he says I put a price on it. If I sell it all Monday, I was too cheap, if I still have it Friday, I was too high.

So within that realm of bid and offer type prices, and the percentage that each of those cuts is, it may sound complex, but the kids we have handle it can handle it.

[Tr. p. 159]

BY MR. McCLEARN:

Q Would you have any objection—you were asked a number of questions about competitors in the market. Would you have any objection, Mr. Monfort, if Excel were to build a plant or build three plants?

A I didn't object when they built Dodge City. I didn't object when they acquired the plant in Toppenish. I only object because of the size of this acquisition.

Q Why, if you don't object or wouldn't object to their building a plant with their own internal resources, why are you objecting to their acquiring the plants in this transaction?

A Because I think they are trying to leap-frog in size. I think they are trying to get market dominance that they should have to work for instead of acquire.

* * * *

THE COURT: You have mentioned, Mr. Monfort, that perhaps the big three or four would include Spencer, Excel, IBP and Monfort; is that correct?

THE WITNESS: I think you have to include SIPCO, which is Swift in that.

THE COURT: They are losing some of their strength; is that correct?

THE WITNESS: Well, they've taken SIPCO out of Esmark and they are on their own, and they are doing pretty good now.

THE COURT: How would you divide the market shares [Tr. p. 160] among those four or five, roughly speaking?

THE WITNESS: From what I understand, why roughly IBP is twice as big as Excel, who is twice as big as the other three of us. I think currently why IBP on the market that I know about would be somewhere 35 to 40 percent, Excel 20 percent, Spencer—if Schuyler were open—10, 12 percent. Without it, why Spencer, SIPCO and ourselves would be in the 6 or 7 percent category of the boxed beef market.

THE COURT: Pardon me, please?

THE WITNESS: Of the boxed beef market.

THE COURT: What has been the effect, if any, on the development of greater market share of IBP since Occidental took it over in 1981?

THE WITNESS: I think since they acquired that, I think Finney County was already built. What they have done is acquired a plant in Illinois, the Geneseo, Illinois, plant which they are in the process of double-shifting from a slaughter standpoint and adding to boxed beef. They have also made a bid for the Fort Morgan and Sterling plants owned by Sterling, Colorado Beef. That bid was turned down by the co-op owners of those two plants, and it was sold to Pepper and Chillowitz.

* * * *

[Tr. p. 161]

RAYMOND SCHUMACHER, PLAINTIFF'S WITNESS, SWORN

THE COURT: You may be seated, please.

What is your name, please?

THE WITNESS: Raymond Schumacher.

THE COURT: And your last name, please, would you spell it.

THE WITNESS: S-c-h-u-m-a-c-h-e-r.

THE COURT: Your occupation or profession, please?

THE WITNESS: I am the General Manager for Iowa Meat Distributors.

THE COURT: And where are you based, please?

THE WITNESS: Beaverton, Oregon.

THE COURT: Pardon me, please?

[Tr. p. 162]

THE WITNESS: Beaverton, Oregon.

THE COURT: How long have you been in the beef industry, please?

THE WITNESS: I started in the industry in 1953.

THE COURT: This has been much of your adult professional life; is that correct?

THE WITNESS: Basically all of it.

THE COURT: And what did you do when you first went to work in the industry?

THE WITNESS: I started to work for Swift & Company out of college on the order desk. I progressed from that to a route salesman. From that to a route supervisor. To an assistant in the Beef Department in 1959 and '60 for Swift & Company, and November of 1960 I was transferred to Medford, Oregon, as a Manager of one of Swift & Company branch houses, and I was there until I resigned in 1966.

THE COURT: What is your title with your company at this time, please?

THE WITNESS: I am the General Manager.

THE COURT: And how large a company is it?

THE WITNESS: Sales-wise we will do about $43 million. We employ 14, 15 people including myself.

THE COURT: You don't do any boning now, though, is that correct?

THE WITNESS: No.

* * * *

[Tr. p. 163]

DIRECT EXAMINATION

BY MR. HARTLEY:

Q Mr. Schumacher, just what is it that Iowa Meat does?

A We buy boxed beef and resell it to customers in our area.

Q What percentage of your total business is represented by your boxed beef transactions?

A Approximately 90 percent.

Q When was Iowa Meat formed, sir?

A We were formed in 1967.

Q And you have been with the company since its inception; is that correct?

A Right.

Q You testified earlier that you are the General Manager of Iowa Meat. What are your duties?

A I am in charge of procurement, sales, distribution, supervision over the warehouse and the sales.

Q Would you please tell me a little bit more about those products that Iowa Meat sells?

A We sell a full line of boxed beef, both in the subprimal Cryovac and boneless Cryovac.

Q Are all your boneless beef products Cryovacked?

A Yes.

Q What does that mean exactly?

[Tr. p. 164]

A That means that the product has been fabricated at the facility, Cryovacked, put in boxes and shipped to us.

Q You are talking about primals and subprimals in various cuts. How is that beef ultimately sold to the consumer?

A It's sold to the consumer in the form of roasts and steaks.

Q Would you please tell us, Mr. Schumacher, the cattle source, I guess, for lack of a better phrase, for your beef? What kind of cattle does your beef come from?

A Our cuts of beef that we sell are from grain-fed choice and no-roll carcasses.

* * * *

Q What's a no-roll carcass?

A No-roll carcass, as we understand it, is the cattle that do not quite meet the standards to be rolled USDA choice or prime.

Q Do you know whether or not it's the equivalent of any particular grade?

A It would be—if it were rolled USDA.

Q Are the cattle that are slaughtered for the boxed beef you purchase typically steers and heifers; is that right?

A Right.

Q Do you sell any ground beef at Iowa Meat?

A Yes, we do.

[Tr. p. 165]

Q What's the source of that?

A Ground beef that we are selling comes from the same suppliers that supply our choice cuts and no-roll cuts. I would presume it would be primarily from their trimmings off of their production of choice and no-roll cattle.

Q Do you sell any cow and bull meat?

A We sell frozen imported bull meat.

Q To what customers? What kind of customers?

A Our customers for that is primarily sausage manufacturers. We do sell it to some purveyors who utilizes it for their ground beef, and we do sell it to some retail outlets, and that is used for making ground beef there also.

Q Do you sell any table cuts, retail cuts, steaks and roasts, for example, cattle and bull slaughter?

A No.

Q Why is that?

A There is relatively no demand in our area for the less expensive cow cuts.

Q Do you have any knowledge as to why there is not any demand?

A The industry retail and purveyors in our area demand—their customers—that their services demand a higher quality than the cow or the bull.

Q Are you saying, Mr. Schumacher, you will never sell cow and bull cuts to your customers?

A We have had special orders from customers requesting a [Tr. p. 166] specific cut from a cow, and we will procure those on order.

Q Can you give me an example of what one of those special cuts would be?

A Well, we would have some jerky manufacture that would want to make some beef jerky, and he would use it—more cow cuts would be more desirable, bull cuts more desirable for making the jerky.

Q Let's talk for a minute about your customers. Who would they typically be, Mr. Schumacher?

A Our major customers are retail outlets; Safeway, Albertsons warehouses like Associated Grocers and Northwest Grocers. The purveyors like Monfort and Washington Beef and Pepper Tree Meats.

Q Are you familiar with the term HRI trade?

A I am.

Q What does that mean to you, sir?

A It stands for the hotel, restaurant and institutional business.

Q Do you service that trade at all?

A No.

Q Do you sell to any customers that service that trade?

A We sell to the purveyors that service that trade.

Q What does their business involve, please?

A They further process the beef cuts that we sell them into steaks or roasts or using some of the trimmings for ground beef.

[Tr. p. 167]

Q Is that commonly called, at least as to the steaks and roast portion, control foods?

A Portion control foods, right.

Q Who are your suppliers, Mr. Schumacher?

A Our two main suppliers are Monfort of Colorado and Washington Beef of Yakima, Washington.

Q Can you tell me how much of your supply comes from those two firms?

A Those two companies represent approximately 70 percent of our total purchases.

Q How would that break down in a typical period of time or typical year? In terms of percentage to each, for example?

A Monfort would represent 40, possibly 45 percent, Washington Beef would be approximately 30 percent.

Q Do you have other suppliers, sir?

A We have a number of supplementary suppliers.

Q Why would you turn to them?

A Because of the large volumes involved in some of the items, on occasion they are not available from our primary sources.

Q Let's identify, if you will, for the record who your other supplementary suppliers would be.

A Well, we have purchased beef from Swift & Company. Swift Independent actually is the name now. Purchase from Pepper. Pepper Tree Packing. From Circle C.

Q Let me stop you right there. Do you know whether Pepper [Tr. p. 168] Tree and Circle C are in any way related?

A As I understand, they are in the process of a merger.

Q Let's go on then, if you will, with your other suppliers.

A Val-Agri, National. We had bought from Kansas Beef Industry at Garden City, and that was acquired by Val-Agri. On special occasions for people demanding holstein cuts we do buy some holstein cuts from Wisconsin Beef Industries and Packerland. We have also brought in on special order from Siouxland Beef on the more richer 4 and 5 fabricator beef cuts.

Q Let me stop you here because sometimes, since I am not entirely clear what you are referring to, what do you mean when you say a richer 4 or 5 fabricator cut?

A The Government has one standard yield grade that goes from 1 through 5, and the leaner beef would fall normally in the 1 category, and the fatter you get it would go up to 5. With the majority of packers/slaughterers they do not fabricate their 4s and 5s. They do sell those to somebody else for fabrication.

Q Do you have, for example, an inventory of 4s and 5s? Would that be part of your regular business?

A No. We don't carry an inventory on 4s and 5s. We bring them on special order.

Q You also talked about holstein cattle, Mr. Schumacher. Can you tell me a little bit about holstein cattle? What kind of holstein cattle or holstein beef do you buy?

A We buy a number of different cuts from the holstein carcass. [Tr. p. 169] We have customers that bid and want a lower, leaner—lower quality, leaner-type beef, even though the grade might be choice, a lot of our more meticulous customers will not accept them, even though the Government grade is on there, but they would be for special orders.

Q That's a fed animal, too?

A They would be fed animals.

Q Now I have an advantage over you in this examination because I have a list which you gave me earlier of some of your packers, and you didn't mention Idaho Beef. Do you buy anything from them?

A We buy one special cut, a cafeteria round.

Q IBP, do you purchase anything from IBP?

A We purchase very small quantities on a fill-in basis from Iowa Beef.

Q Has it always been the case that you only purchase small quantities from IBP?

A At one time Iowa Beef was our main source of supply. They represented about 90 percent of our purchases of beef products. We started—

Q Let me stop you then and ask when that was? Let's place it in time, if you could.

A Well, we started with them in 1967, and that's kind of where we got our name, Iowa Meat Distributors, and we developed the business in the Northwest.

[Tr. p. 170]

From the first year our purchases from Iowa Beef Processors were somewhere in the neighborhood of 500,000 or $600,000. In 1976 they chose to put in their own distribution sales organization called Customer Service Center.

Q That's an Iowa Beef entity, if you will?

A That's an IBP entity. Then in essence they were in direct competition from that point on, and our purchases—the last year that we dealt—quite majority of our business with Iowa Beef was about $37 million.

Q Why is it that you don't buy much beef from them any longer?

A They are direct competitor for the accounts that we have developed.

Q Have you ever lost any accounts to Iowa Beef?

A Yes, we have.

Q Can you tell me about that, briefly?

A We developed very good business with Albertsons, very good business with United Grocers in Portland. When we got to a level that we could use carloads, they said that we no longer need you for that; since they can buy carloads, we will sell them direct.

Q And "they," you are referring to as Iowa Beef?

A Iowa Beef, right.

Q You indicated that your primary product was boxed beef of various kinds, and that was vacuum wrapped in Cryovac; is that right?

[Tr. p. 171]

A Correct.

Q Why is that? That's your primary product, Mr. Schumacher?

A I believe I think the customers demanding at this stage of the game is boxed beef almost entirely. We in our area have hardly anyone using carcass cattle.

Q Are there any particular advantages to boxed beef that have caused that to be the case?

A I believe there are.

Q What would those be, sir?

A I think it would be a lesser expense as far as freight, bringing the product to us and getting it to the customers. It has a longer shelf life. The consistency of the trim assists them for a more consistent yield.

Q Is storage and handling cost a factor?

A We are able to utilize substantially less storage space and less handling expense, yes.

Q Is it an alternative for your beef requirements, Mr. Schumacher, to purchase carcasses?

A No.

Q Why is that?

A There are virtually no swinging carcasses available for our area.

Q Do you have any fabrication facilities if they were available?

A No, we don't.

[Tr. p. 172]

Q Do very many of your customers have fabrication facilities?

A No.

Q Do any of your customers have fabrication facilities?

A We may have a few retail markets, but none of our major outlets do.

Q Is it an alternative for your beef requirements, Mr. Schumacher, to purchase unboxed or beef that is not Cryovacked?

A No.

Q Why is that?

A It just wouldn't be feasible for us to handle it economically and they—

Q Can you tell me in a little more detail why that is?

A Well, number one, they are not available in any consequential amount, and we have no facilities for rails and for handling the non-Cryovacked swinging beef or pieces.

Q Is shelf life a factor in that?

A Shelf life would be more shrink involved, more deterioration, more discoloration of the product.

Q Do you maintain an inventory of boxed beef?

A Yes, we do.

Q Why do you do that?

A We have a flow of product that we sell every week, every day, and we maintain approximately $400,000 to $600,000 of boxed meat on inventory.

Q Are you familiar or do you have a term in your operation [Tr. p. 173] called your steady business?

A Yes, we do.

Q What does that refer to?

A These are the customers that buy week-in and week-out an amount of boxed prestandard things each week, approximately the same quantity.

Q What percentage of your overall beef sales would be represented by your steady business?

A Our steady business would be 60 percent.

Q Who are the suppliers for your steady business?

A Monfort and Washington Beef.

Q And why is it that you turn to them for this trade, sir?

A Because of the acceptance of their product and the availability of their product.

Q What do you mean by "acceptance" of their product?

A The controls that they have for production that our customers can depend on them week-in and week-out to be consistent for their yields.

Q Do you also—you referred to the availability of their product. What did you mean by that?

A We have to have a certain base number to maintain this consistent week-in and week-out business, and there aren't that many suppliers available today that we can depend on that.

Q That can supply the volume you need?

A Right.

[Tr. p. 174]

Q Can you tell me how you negotiate to purchase the beef that comprises your steady business?

A Each Monday we get a complete price list of all the items available from the various different suppliers, and that may be updated up or down daily, but that is our base for pricing, is the delivered price that they give us.

Q Do you pay the prices on the price list?

A On our day-to-day business, yes.

Q And that's 60 percent of your total?

A Right.

Q What accounts for the rest of your sales?

A And the other 40 percent would be primarily feature items.

Q What do you mean by "feature items"?

A These would be items that the retailers would utilize for their ads.

Q Specials, for example?

A Specials or—

Q The term that I might know from the local supermarket?

A Right.

Q What's the process that results in your buying beef for specials?

A Well, we're in communications constantly with our customers, and they will be advising us that they will be looking for specific items for a specific number of loads, one, two, three, four, five loads, maybe ten loads, and give us a [Tr. p. 175] time frame for delivery.

We then contact our suppliers, discuss with them what we are looking for, give them the parameters of the item, the amount of loads they are searching for and the day of delivery, and at that time they will give us a figure

that may be less or may be greater than their current list price depending on what their anticipation of the market is.

Q Do you negotiate with them over that price?

A Once they establish that price, no.

Q How do you decide who to buy from for this special or ad items business?

A Well, first of all, it is by the acceptability of the customers' needs. That the supplier we are using is acceptable for them. The availability, the consistency of the product and the price.

Q Do you call around to multiple suppliers?

A Yes, we do.

Q In fact, you typically call most of your suppliers, you already told me, you purchased beef from from (sic) time to time; isn't that right?

A Right.

Q Is there any other segment of your business that we haven't discussed yet, Mr. Schumacher?

A We do a little bit of business in poultry and pork, but it's just fairly new with us and it only accounts for about [Tr. p. 176] three, four, five percent of our total volume.

* * * *

Q You mentioned that your suppliers are primarily Monfort—your primary suppliers, excuse me—were Monfort and Washington Beef; isn't that right?

A Correct.

Q Do you feel you have alternate suppliers that could provide you with a source of supply for your steady business?

A There are a few larger ones that have come back in. SIPCO is one that has come back. That would be able to assist us.

Q Let me go down the list you gave me before and that we talked about in your testimony, Mr. Schumacher. Circle C and Pepper Tree, would they be able to supply your steady business?

A A portion of it.

Q How about National Beef?

A A portion.

Q Val-Agri?

A A portion.

[Tr. p. 177]

Q How about Idaho Beef?

A Just on special orders. It wouldn't be a factor.

Q Packerland?

A There again, special orders.

Q Wisconsin?

A Special orders.

Q Siouxland?

A Those would be special orders.

Q How about IBP?

A Well, IBP could, but IBP is a direct competitor of ours in our area.

Q Do you view them as an alternative source of supply?

A No.

Q How about Excel? Do you purchase anything from Excel?

A We haven't for probably 12 years ago, I think was the last time. I think it was Missouri at that time.

Q Why is that?

A Well, we have contacted MBPXL on occasion and talked with a Mr. Don Webber, and Mr. Webber informed us that they had a company called Western Excel in our area that was handling their product, and they were not interested in doing business with us.

Q Do you view Excel as an alternative source of supply for your business?

A I think potentially they could be.

Q But they haven't expressed the willingness?

[Tr. p. 178]

A They haven't expressed the desire.

Q How about Spencer Beef?

A We have bought from Spencer, but it had been three or four years ago.

Q Do you view them as a potential source of supply for your steady business?

A If they were operating in all their plants, they would be.

Q Now, Mr. Schumacher, I believe the plants you have been describing have been characterized in testimony here today already as integrated slaughterer/manufacturers, and that would be Monfort, Spencer, IBP and so forth. Is that a term you are familiar with?

A Right.

Q Has the number of integrated firms to which you could turn for supply diminished in the past few years?

A Substantially.

Q Did you used to purchase beef from Swift in Portland?

A Right.

Q Are they available to you now?

A They are closed.

Q Did you used to purchase from Armour in Portland?

A Yes.

Q Are they available to you now?

A They are closed.

Q Did you used to purchase from Coast Packing in Portland?

[Tr. p. 179]

A Yes.

Q Are they available to you now?

A They are closed.

Q Did you used to purchase from Pacific Meat in Portland?

A Yes.

Q Are they available to you now?

A They are closed.

Q Did you used to purchase from Associated Meat Packers in Portland?

A Yes.

Q Are they available to you now?

A They are closed.

Q Did you purchase from Beaver Creek Meat in Portland? Are they available?

A They are closed.

Q Kinter Packing in Portland?

A They are closed.

Q H&H Packing in Yakima, Washington? Are they closed?

A Yes.

Q How about Auburn Packing in Auburn, Washington?

A Yes.

Q Are they closed?

A Yes.

Q High Grade Packing in Spokane. Are they closed?

A Yes.

[Tr. p. 180]

Q Cudahy in Seattle?

A Yes.

Q Did you purchase from them in the past?

A Yes.

Q Are they closed now, too?

A Yes.

Q How about Cudahy in Pasco, Washington?

A Yes.

Q Did you purchase from them?

A Yes.

Q And they are closed now as well?

A Right.

Q Western Packing in Toppenish, Washington?

A Yes.

Q Did you purchase from them?

A Yes.

Q And they are closed now?

A Yes.

Q Did you purchase from Nebbergall Meat in Albany, Washington?

A Albany, Oregon.

Q And they are closed now?

A Yes.

Q How about Arrow Meat in Cornell, Washington?

A We used to purchase from them.

Q Are they closed now?

[Tr. p. 181]

A Yes.

Q How about Wells and Moseley?

A They are in Idaho.

Q Where are they located?

A And I can't remember the little town that they were. It's been several years since they closed.

Q Are there other firms that used to be a potential source of supply for you that are also closed?

A There are so many of them I couldn't probably name them all that have gone.

Q Did you also, or have you in the past purchased beef from fabricators that didn't engage in slaughter operations?

A Yes.

Q Would Siouxland Beef be an example of that?

A Yes.

Q And Idaho Meat as well?

A Yes.

Q Were there others?

A There was an Ada and Harris in Portland.

Q Is that closed?

A Yes.

Q How about Rocking C in Portland?

A Yes, they are closed.

Q And how about Gold Star in Colorado?

A Yes.

[Tr. p. 182]

Q Are they closed?

A I believe so.

Q Midland Pack in Billings?

A We did purchase fed cuts from them and they were closed. I think they have reopened under a cow operation now, but I am not positive.

* * * *

Q And that was Flavorland in Seattle, and I gather they are also closed as well?

A Right.

Q Are there any retail stores with central fabrication facilities in your marketplace?

A One small operation at West Coast in Tacoma.

Q To save us some time, Mr. Schumacher, isn't it true there used to be others as well?

A Right.

Q Safeway in Portland and Seattle?

A Right.

Q And those are closed?

A Yes, right.

[Tr. p. 183]

Q Associated Grocers in Seattle?

A Right.

Q And those are closed as well?

A Right.

Q Overall, Mr. Schumacher, can you summarize for us by telling us whether the numbers of suppliers that are available to you has increased or decreased over the last five to ten years?

A Decreased.

* * * *

Q Does that cause you any concern, sir?

A Substantial.

Q Can you tell me why?

A We find that as each one of these people go by the wayside, whether it be in the form of closure or by acquisition, it's just one less supplier that's available to us.

* * * *

[Tr. p. 184]

Q Now, Mr. Schumacher, you have testified that your business is the purchase, sale and distribution of Cryovac boxed beef; isn't that right?

A That's right.

Q Do you have a—well, are you familiar with the announcement by Excel Corporation of its intent to acquire the Spencer beef plant?

A Yes.

Q Do you have an opinion concerning the effect of that acquisition upon your business, sir?

A In my opinion it would be detrimental.

[Tr. p. 185]

Q In what way?

A It would just eliminate one more source of supply.

Q How would that cause you some concern?

A Well, IBP/Excel has already expressed their desire not to do business with us, and we have done business with Spencer. I would have to assume that if they did acquire Spencer, that they would continue their same attitude and that would be one less person that we would be—that we would have available to secure meat from if we needed it.

Q Do you have any concern or any opinion about the effect of the possible or the proposed acquisition on the price of the product that you buy at Iowa Meat?

A In my opinion that in the short-term, that the price of meat would be down I think once the two major suppliers of beef had a larger percentage of the market that

they could determine their prices as they wished, and it would be more costly to the end user in the long run.

* * * *

[Tr. p. 186]

CROSS-EXAMINATION

BY MR. RAM:

Q Mr. Schumacher, you mentioned a number of suppliers that have gone out of business in years past. Would you name for us, please, those among them, if any, who primarily sold boxed beef?

A Coast Packing Company, Pacific Meat Company, Associated Meat Packers, Flavorland in Seattle. To my knowledge the others—I am not positive that they primarily sold, but those I do know did.

[Tr. p. 187]

Q Thank you. You testified that your company had $43 million in sales last year; is that right?

A Correct.

Q You haven't had a real problem obtaining a sufficient supply of beef, have you?

A In what respect do you mean?

Q You have got enough beef so that you could have $43 million in sales last year, didn't you?

A Yes, true.

Q So you didn't have a real problem obtaining a sufficient supply of beef, did you?

A There were times when we could have sold substantially more had we had access to it.

Q It's true, is it not, Mr. Schumacher, that there are about six suppliers that you buy from on a steady basis?

A Yes.

Q Those six companies include Monfort, Washington Beef Processors, Swift Independent, Circle C, Pepper Tree and Iowa Beef Processors?

A What was the last one?

Q In your deposition you say Iowa Beef Processors; is that correct?

A We don't buy on a regular basis, but we do buy from them.

Q Would you name your six steady suppliers?

A Two primary suppliers that we have are Monfort and [Tr. p. 188] Washington Beef.

* * * *

THE WITNESS: Monfort and Washington Beef, our two primary suppliers. We obtained beef from SIPCO which is Swift Independent, Pepper Tree, Circle C, Iowa Meat.

Q And didn't you further testify that in addition to the six companies that you buy from on a steady basis, you also buy from Val-Agri, Idaho Beef Processors, National Beef, Packerland Industries, Wisconsin Beef Industries and Siouxland Beef?

[Tr. p. 189]

A True.

Q Val-Agri just entered the market this year, didn't they, Mr. Schumacher?

A I believe so.

Q And they are one of the companies that you buy from, aren't they?

A We have.

* * * *

Q And the six or so suppliers that you typically buy from are typically competing against you for business, aren't they?

A To a degree.

[Tr. p. 190]

Q They are competing for your business, aren't they? These six or so suppliers that you typically buy from?

A Some of the suppliers that we buy from do not manufacture, say as an example, chuck rolls in any quantity that would make them a source of supply. Though we may buy another item from them. But they had not been a whole supplier that we could procure our total needs from.

* * * *

Q To your knowledge the beef suppliers that sell to you have never gotten together and conspired to raise the price of beef, have they, sir?

A No.

Q You don't know of any instance in which beef suppliers have colluded to keep beef prices up, do you?

A No.

Q And you don't expect that if Excel acquires Spencer, beef suppliers are going to collude to keep prices up, do you?

A No.

Q In fact, sir, you could not imagine beef suppliers colluding today to keep beef prices up, could you?

[Tr. p. 191]

A No.

Q You are not buying any beef from Spencer right now, are you?

A It's been some time since I have procured any meat from them.

Q In fact, you testified that you haven't bought any beef from Spencer for four years, didn't you?

A I said I would have to look it up in our records, but approximately that time.

Q And even when you bought from Spencer four years ago, you bought very little beef from them, didn't you?

A In proportion to our total usage, yes.

Q You testified that Excel is not selling any beef to you now; is that right?

A Yes.

Q It's true, is it not, that within the last year your only communication with Excel was one telephone conversation with Don Webber?

A I believe it was more than one. I think originally I called and talked to Don Webber, talked to another fellow there whose name I did not take, and asked him to have Don Webber call me back.

Q And that was the entire substance of that conversation, wasn't it?

A No. I said I was interested in getting some figures and [Tr. p. 192] availability of product, and he said he would have Don Webber call me back, he was out of town.

Q Apart from that one conversation when you say you said I am interested and they said they would have Don

Webber call you back, isn't it true within the last year your only communication with Excel was one telephone conversation with Don Webber?

A At a later date, not having Don Webber return my call, I called him back and was informed at that time that they had a representative in our area, Western Excel, and they were not interested in selling us any beef products.

Q And was that your only communication with Excel within the last year?

A I thought his answer was pretty explicit and didn't pursue it.

* * * *

[Tr. p. 196]

Q There is no inherent difference between boxed beef from breakers and boxed beef from packers, is there?

A I think there is.

* * * *

[Tr. p. 198]

REDIRECT EXAMINATION

BY MR. HARTLEY:

Q What was the follow-up discussion that you were referring to, Mr. Schumacher, in your discussion with oposing counsel here about the difference between boxed beef from packers and boxed beef from breakers?

A In reality—in the context of what our discussion was, is that boxed beef from packer/breaker combination versus plain breakers was better in a number of ways because we could—beef that was going into the box from the

slaughter/breaker was fresher going into the Cryovac. There was less problems as far as deterioration, discoloration, and then what we would achieve from the breaker that had a time element that would be 24 hours to 48 hours from the time it was loaded in the trams [Tr. p. 199] until it could be delivered to a further point, and then processed to that further point.

Q Any other differences in your mind?

A The breakers were at the mercy of the slaughterers. Most of the breaker/slaughter operations would take their preferable cattle and do it themselves and be more apt to send the less desirable cattle to the breakers.

* * * *

[Tr. p. 200]

JOE D. PACE, PLAINTIFF'S WITNESS, SWORN

* * * *

THE COURT: Thank you.

Give us your name, please.

THE WITNESS: My name is Joe D. Pace, P-a-c-e.

THE COURT: I believe you have a doctorate; is that correct, please?

THE WITNESS: That's true.

THE COURT: Dr. Pace, what is your specialty or principal line of work, please?

THE WITNESS: I am an industrial organization or antitrust economist, and I also do a lot of public utility work.

THE COURT: And just summarize what your earned degrees are in, please? We will admit in evidence the resume of this [Tr. p. 201] witness as an exhibit together

with publications and the list of cases in which he has testified to. That will come in as an exhibit. However, just so we have something in the record, give us your earned degrees and major fields, please.

THE WITNESS: Yes, sir. I have a BA degree from the College of William and Mary, and that's in economics. I also hold a Master's degree and doctoral degrees from the University of Michigan.

My specialties were industrial organization or antitrust economics.

THE COURT: That wasn't your major field. Is that what the major field was called?

THE WITNESS: Yes, it was called industrial organization.

THE COURT: Okay.

THE WITNESS: And other specialties were public utility economics, which was really a subset of that, and labor economics.

THE COURT: Have you had any experience in academia, please?

THE WITNESS: The only experience I had in academia was teaching while I was pursuing my doctorate.

THE COURT: You have been qualified as an expert in earlier cases and in federal courts as set forth in your resume; is that correct, please?

THE WITNESS: That's correct, yes.

[Tr. p. 202]

THE COURT: What area or areas are you seeking to qualify Dr. Pace as an expert in, please?

MR. McCLEARN: I am asking that he be qualified as an expert as an economic consultant with particular em-

phasis on the antitrust economics involved in this lawsuit, and I confess to you, Your Honor, that I also would qualify him as an expert in the industrial organization, and I cannot tell you how that differs from being a consulting economist, but it seems to me that his qualifications as set forth in his resume will justify his reception as an expert in both.

THE COURT: Counsel, any objection to so qualifying this witness as an expert in those fields, please?

MR. HANLEY: I think he is qualified in the field of industrial organization. I think he's better qualified in regulated industry, but on the basis of his resume I can't say that he's not qualified to make an analysis, at least on paper, of the antitrust aspects of this case, Your Honor.

THE COURT: The Court will note counsel's comments. The Court will qualify him in the areas described and outlined by Mr. McClearn. You may present opinion testimony therewith. Let's lead the witness through the preliminary questions, or unless you are going to submit an original narrative from this witness.

* * * *

[Tr. p. 204]

THE COURT: Exhibit 74, the testimony of this witness, will be admitted in evidence.

(Plaintiff's Exhibit 74 admitted.)

THE COURT: Now I take it that the stipulation goes so far as to include the attachments that apparently are referred to in the testimony of this witness; is that correct, please?

MR. HANLEY: Yes, Your Honor, that's correct.

* * * *

[Tr. p. 205]

DIRECT EXAMINATION

BY MR. McCLEARN:

Q Dr. Pace, do you have in front of you a copy of what has been marked by the Court as Exhibit 74, including the attachments?

A I do, yes.

Q And does that represent your direct testimony in this proceeding?

A It does, with one minor correction.

Q I am going to ask you about that correction, but to the extent that it does represent your direct testimony, do you recognize and understand that that was given under oath just as if I had asked you the questions represented in the testimony and you had given me the answers that are reflected?

A I do, yes.

Q Is there a minor correction in there that you wish to call to the Court's attention?

A Yes. It occurs on Page 40 of the testimony on Table 10.

THE COURT: Speak just a little louder, Doctor, would you, please.

THE WITNESS: Yes, sir.

THE COURT: Go ahead, please.

BY THE WITNESS:

A The last-minute checking I believe there are two minor errors there. I think that IBP the entry should be $25,000 [Tr. p. 206] instead of $24,000.

THE COURT: By interlineation may we correct that, please?

MR. McCLEARN: Yes, Your Honor.

MR. HANLEY: Have no objection, Your Honor.

THE COURT: It will be so ordered, please.

THE WITNESS: And then for Excel, the second line, it should be 11850 instead of 12650. Then that creates a change in the total industry figure so that it should be 83430 instead of 83230.

It also, of course, creates minor changes in the share figures so that the share figures would read 30.0.

THE COURT: Pardon me, please?

THE WITNESS: 30.0 starting at the top for IBP.

THE COURT: Thank you.

THE WITNESS: 14.2 for Excel. Then 7.9 for Monfort. 8.4 for Swift. 7.9 for Spencer.

That also means that in the sentence that is immediately under the table on Page 40 of my testimony, that that sentence would read that "The proposed Excel/Spencer acquisition would increase the four-firm concentration of large-scale slaughter capacity in the 12-state market from 60.5 to 68.4 percent."

* * * *

[Tr. p. 207]

THE WITNESS: Okay. I will repeat all the ones that were changed. The IBP one would be 25,000 rather than 24, and Excel would be 11850 rather than the 12650, and then just reading down how that affects the share statistics, it would be 30.0 for IBP, 14.2 for Excel and 7.9 for Monfort, 8.4 for Swift and 7.9 for Spencer.

THE COURT: Would that total a hundred percent?

THE WITNESS: No. That does not total a hundred percent because that's just the five larger firms. The total industry number, of course, would remain a hundred percent there.

THE COURT: No additional changes then; is that correct?

THE WITNESS: Correct, yes.

THE COURT: Counsel, did you get these figures?

MR. HANLEY: I did. Thank you, Your Honor.

THE COURT: I take it that if the questions were asked of you on the subject matter covered in this document, that your answers would be harmonious to the recitals stated in this exhibit; is that correct, please?

THE WITNESS: That's correct, yes.

THE COURT: And this is your understanding?

MR. McCLEARN: It is, Your Honor.

[Tr. p. 208]

THE COURT: And this is your understanding?

MR. HANLEY: Yes, Your Honor.

THE COURT: Thank you.

MR. McCLEARN: Your Honor, given the understanding that we had originally about filing written testimony in the case of experts, I concluded that I will now consider my direct examination finished and tender the witness for cross-examination.

THE COURT: So there won't be any question about it, the exhibit and attachments will be admitted in evidence, please.

* * * *

CROSS-EXAMINATION

BY MR. HANLEY:

* * * *

[Tr. p. 215]

Q Monfort of Colorado stated in its answers signed under oath by Mr. Monfort to Defendants' Interrogatory Number 21, second set, that it did not contend that any relevant markets that it had identified for the purpose of this case were currently functioning in a non-competitive fashion. Do you agree with that answer?

A I do, yes.

Q And in the beef fabricating market, is it accurate to say that inefficient producers have been squeezed out by the more efficient producers?

A Yes.

* * * *

[Tr. p. 216]

Q Dr. Pace, are you aware of whether or not there are grain-fed cows?

A I believe there are some.

Q You have heard of grain-fed Holstein?

A Yes, I think so.

Q If there were a fair number of grain-fed Holsteins slaughtered, where would you include the grain-fed Holsteins in your list?

A If they produced good grade of beef, competitive grades of beef, good or better quality, I would include them with that. With fed.

Q Did you include any grain-fed Holsteins in your list?

A I guess my understanding is that if they are steers or heifers, which a lot of the Holsteins are that are fed, that they would be in the fed steers and heifers category.

* * * *

[Tr. p. 218]

Q In Montfort's answer to Defendants' Interrogatory Number 5, first set, Monfort stated that the broadest relevant geographic market for the procurement of grain-fed steers and heifers includes the states of Nebraska, Kansas, Iowa, Missouri, South Dakota, Wisconsin, Illinois, the high plains area of Oklahoma, Texas, New Mexico, eastern Colorado and the southern edge of Minnesota. Do you agree that this is the largest geographic relevant market in which you contend the effects of the proposed acquisition would be measured with the procurement of fed beef?

A Yes.

* * * *

[Tr. p. 222]

Q Well, just to make it clear, Doctor, let's assume for a minute that there are two steel mills in a city right across the street from one another. Both produce identical I-beams, but one of them is integrated with an iron ore mill some ten miles away. The other buys iron ore from a mine a hundred miles away.

As a result, the integrated mill is more profitable than the other mill, even though both sell identical I-beams for the same price often to the same customers.

Would you, as an economist, consider these mills to be competitors?

A I would consider them to be competitors in the short run. If there was a substantial disadvantage to not being integrated, I would take that into account in assessing the relative competitiveness of them in the long run.

Q In the long run, but in the short run they are competitors?

A Well, even in the short run if the integrated entity suffers a substantial cost disadvantage he is not likely—he may meet prices, either not liking to be a price maker—he is not likely to be a driving competitive force.

Q If he sells products, he is going to be a competitor?

A He is going to be a weak competitor, let's put it that way.

* * * *

[Tr. p. 223]

Q Would you agree that fabrication facilities then that are not integrated with slaughter facilities are less efficient?

A That's my understanding.

Q And one of the reasons you say that integrated slaughter/fabricator plants are more efficient is because of the cost of transporting carcasses from one place to the other; isn't that right?

A That's one of them, yes.

Q And that's an important one?

A Yes, it is.

Q Are you aware that Excel's Wichita fabrication facility is located 150 miles from Excel's nearest slaughter facility?

A I am, yes.

Q Let me direct your attention to Table 1 of your testimony, your declaration, on Page 30.

A Yes.

Q Let me just make sure, okay? In calculating these figures did you include Excel's Wichita production?

A That would have been included, yes. This would be the fabrication of all slaughterer/fabricators, and the way those statistics are collected, it would include the fabrication even in those few cases where there is separate fabrication.

Q In your analysis then did you include boxed beef produced by non-integrated fabricators who could get carcasses from [Tr. p. 224] slaughterers within 150 miles of their plants?

A In these data that is there to the extent that that is a slaughtering fabricator, that he does slaughter. There is very little of that that takes place, but there is some.

Q How many slaughter facilities does IBP have?

A I can look that up for you.

Q Well, would you agree that they have 11?

A I think that sounds right.

Q All right. How many fabrication facilities does IBP have?

A A lesser number. I would have to look it up to give you the exact number.

Q Five? I think we can save time by referring you to Exhibit 26, Plaintiff's Exhibit 26, but—

THE COURT: Are you suggesting—

MR. HANLEY: Yes. I'm suggesting that this is the figure.

THE WITNESS: All right. I will accept that.

THE COURT: Let's accept that right now, please.

BY MR. HANLEY:

Q So six out of eleven IBP plants are stand-alone plants, right?

A At the present time, that's true, yes.

Q Isn't it true that you believe that the disadvantage associated with shipping carcasses to a fabrication plant increases with distance?

[Tr. p. 225]

A Yes, obviously.
Q Do you know where Pasco, Washington, is?
A No. Not with any great precision other than it's in the State of Washington.
Q Do you have any idea where Boise, Idaho, is?
A I have an idea.
Q Are you aware that IBP ships carcasses from Boise to Pasco?
A I believe that's correct, yes.
Q And those two plants are more than 200 miles apart?
A Yes. They don't ship the entire amount there, but Pasco is—
Q They do ship between those two plants?
A They do, yes.

* * * *

Q On Page 19 of your testimony, you say that "It seems implausible" that small fabricators could expand ca-

pacity. On Page 20 of your testimony you say that Mr. Monfort told you that "Significant economies" are available by operating double [Tr. p. 226] shifts.

Are you aware, Doctor, of which, if any, small fabricators whose expansion you say is implausible are now operating double shifts?

A As the general matter that we don't know that information about the smaller ones, but when I say implausible I mean an expansion at an economic and competitive cost.

Q If a small operator fabricator that now operates one shift began to operate two, it would expand capacity almost double, wouldn't it?

A It would, but it might not do it quickly.

Q But you don't know that?

A Well, I think I do know it. If we are talking about 200 head a day plant from expense of 400 the other day, everything I have been given to understand about the business that is not likely to be a competitive plant.

Q You are saying it has to be a 200 head plant?

A I didn't say that at all.

Q If you take it up to 500, would it still be in your small category?

A Yes.

Q On Page 9 of your testimony, you say that customer-owned fabrication tends to be smaller and higher cost, and thus probably operates less intensively than large-scale slaughter fabricator capacity. On what do you base that opinion?

[Tr. p. 227]

A Well, I base it on the fact that given the number of installations that we have, the average plant size in

general is pretty small, and once again as far as the cost effectiveness of it, I base that upon the general evidence which I really think it's very persuasive, the very great economic sale that exists in this business plus the facts that they are not combined slaughter/fab plants.

Q Are you aware that some customers who own fabrication facilities also buy some of their boxed meat needs from packers like Monfort and Excel?

A Yes, I am.

Q Are you aware that some cow meat is boxed and sold to supermarkets and restaurants in primal and subprimal cuts, table cuts?

A Yes. I am given to understand that that happens, but it's extremely limited.

Q Do you include such cow meat in your packer boxed beef product market?

A As a general matter, no. My understanding is it's, generally speaking, very inferior quality and that the vast majority of the customers won't accept it.

* * * *

[Tr. p. 234]

[REDIRECT EXAMINATION BY MR. McCLEARN]

Q Let me put the question this way. Is it your testimony that it would be possible to ship an animal from eastern Colorado to eastern Illinois without the transportation cost affecting the marketing of that particular animal?

A I think my testimony is that the transportation cost would be ve y great indeed of shipping a thousand miles.

Q Any steer or heifer?

A Yes.

Q You were asked—

A Particularly a fed one.

* * * *

[Tr. p. 235]

Q Last question, Dr. Pace. During your review and analysis which led to the testimony that you have given here today, did you have an opportunity to examine a number of documents that were obtained from the Defendants in this case?

A Yes, I did, and large numbers of them are attached.

* * * *

[Tr. p. 236]

Q And did you use and rely in forming your opinions to some extent upon the documents that were obtained from the Defendants in this case?

A I did, yes.

* * * *

[Tr. p. 261]

[WILLIAM G. FIELDING, DEFENDANTS' WITNESS, SWORN]

[THE COURT:]

Would you go ahead, please. Give us your title, would you, please, Mr. Fielding.

THE WITNESS: I am the President of Excel.

THE COURT: Where are you based, please?

THE WITNESS: Wichita, Kansas.

THE COURT: And how long have you been President of the company, please?

THE WITNESS: Since February of this year.

THE COURT: And in all, how many years have you been with the company, please?

THE WITNESS: I have been with Excell three years.

* * * *

[Tr. p. 267]

[DIRECT EXAMINATION BY MR. HANLEY]

Q Okay. And where exactly are Excel's fabricating plants located?

A Well, we have two in Texas that are both fabrication and slaughter. Friona and Plainview, Texas. We have a new plant in Dodge City, both fabrication and slaughter. Wichita, Kansas is only fabrication. Rock Port, Missouri is fab and slaughter, and Cozad, Nebraska is just slaughter.

* * * *

[Tr. p. 268]

Q Excel has taken steps to acquire the Spencer Beef Division of Land O' Lakes. What has your role been in that acquisition?

A Well, one of looking at, and we've looked at it for a number of years in terms of where would we like to be. We have not had a presence in the north, to speak of. We thought that [Tr. p. 269] we would like to have a

presence in the north to learn more about the cattle market on a daily basis. As to how it operates in the north.

We also have found that it's been very tough to be consistently competitive in all areas of the country because at times there will be a discount in the north versus the south; and other times there will be a premium in the north versus the south. But in order to provide a product, say, especially in the Illinois/Indiana/Ohio area, for our boxed beef and other products that we produce, we felt that it made sense to have plants in the north, give us a better balance.

Q How would the acquisition give you a presence in the north?

A Well, the plants that we would be acquiring are all in the north. They are in Nebraska and Iowa.

* * * *

[Tr. p. 284]

CROSS-EXAMINATION

BY MR. HARTLEY:

Q Mr. Fielding, it's true, isn't it, your basic business is buying fed cattle and selling boxed beef?

A Yes.

Q Could you turn, please, in the exhibit books I put before you to Exhibit Number 42.

* * * *

[Tr. p. 285]

Q Can you identify that exhibit for the record, please?

A It's called "Boxed Beef Share of Retail Market." It's authored by William Fielding.

Q That's an article you wrote for the Cargo Bulletin, isn't it?

A Yes.

Q June of 1983?

A Yes.

Q And in that article you indicated that boxed beef was introduced into the industry in the 1960s?

A Yes.

Q You also stated, I believe, that at the time you wrote the article you thought about 65 to 75 percent of all beef sold at the retail level was boxed?

A Yes.

Q And when we met for your deposition a week or two ago you told me that you thought probably the figure was closer to 75 or 80 percent of all beef received at retail price was boxed, didn't you?

A Yes.

[Tr. p. 286]

Q And similarly the article indicates that you expect by 1985 that boxed beef share of the market would reach 80 percent?

A I think that's correct, 80 to 85.

Q Right. Well, you just answered the next question. At your deposition we decided it's probably more like 80 to 85; isn't that right?

A Yes.

Q It's a fair statement, isn't it, Mr. Fielding, that this article is a pretty good summary of the advantages of boxed beef in the marketplace?

A I don't know how much it addresses the summary of the advantages, but I think it gives a basic outline of the boxed beef market.

Q Well, take a look, if you will, at Page 2, and—well, really Page 2. After we described the process that is boxed beef, why the article talks about why retailers use boxed beef, doesn't it? Let's look at the first full paragraph on Page 2.

A Okay.

Q And it talks about increasing marketing flexibility and reducing wages, things like that?

A Yes.

Q And the next paragraph talks about how boxed beef processing permits assembly line production which has increased meat processing and productivity?

A Yes.

[Tr. p. 287]

Q And the next paragraph talks about transportation savings?

A Yes.

Q And finally vacuum sealed boxed beef minimizes handling problems and provides more sanitary meat cuts?

A Yes.

Q It was your intent when you wrote that article to do a pretty good job of summarizing the advantages of boxed beef, wasn't it?

A I think so.

* * * *

Q Mr. Fielding, do you have in front of you now Exhibit 33-A?

A Yes.

Q That's a binder, isn't it, that's prepared by Excel to present primarily to retail stores as a promotional device?

A Yes.

Q Would you turn to Page 19 in that document, please?

[Tr. p. 288]

A Okay.

Q That's a section of this series of promotional materials entitled "Boxed Beef Makes Economic Sense," isn't it?

A Yes.

Q And it describes the key advantages of boxed beef as lowering freight costs, lowering shrinkage, lowering labor costs, improving quality and improving merchandising?

A Yes.

Q Now there is an example in the next page, really the next let's say three pages, I believe, Pages 20, 21 and 22. An economic comparison of boxed beef versus swinging carcass beef, isn't this?

A Yes.

Q And that is designed to incorporate some reasonable assumptions concerning the costs the retail market might incur in labor and handling?

A Yes. It's probably to show a best case scenario-type situation.

Q Well, you weren't trying to mislead your supermarket customers; were you?

A No. I don't think when we have a brochure that is sales promotion material, that we are trying to mislead them. We are trying to show them things in the best light.

Q You are trying to show them what you think you might be able to save by purchasing boxed beef?

[Tr. p. 289]

A We are showing them what the best case scenario would be.

Q You are showing them what you think a reasonable scenario is?

A We are showing.

Q Well, you wouldn't include anything in here that was an unreasonable assumption about transportation costs, would you, Mr. Fielding?

A What I would include in here is the best case scenario.

Q It's a reasonable scenario, isn't it?

A The words I am using is best case scenario.

Q You aren't going to tell me it's an unreasonable scenario, though?

A No.

Q Let's assume there is a retail store out there that fits this model that has transportation costs or retail costs that are substantially equivalent to the assumptions in this model. Can you go with me that far?

A Sure.

Q Now isn't it true, Mr. Fielding, that if a customer fits that model Excel could increase its price $87.77 per boxed beef per head before that customer would have an economic incentive to switch to carcasses under the assumptions in this model?

A Yes.

Q And isn't it also true, Mr. Fielding, that you have expressed the opinion that there are strong and irreversible [Tr. p. 290] trends toward increasing boxed beef production because of substantial savings in labor, transportation and handling?

A Yes.

Q But help me out here a little bit. Despite these cost savings that we have just talked about and you have expressed an opinion on, apparently there are some customers that haven't switched entirely to boxed beef?

A Yes, that's right.

Q Now one reason is that in the past there have been disputes with the unions that have meant that it takes awhile to make a switch; isn't that right?

A Yes.

Q Maybe there are some union contracts that have had restrictions that didn't allow the retail stores to buy boxed beef?

A There have been in the past, yes.

Q And some retailers perhaps feel they have a little more leverage over the beef packers when they can buy both carcasses and boxed beef and know what the packers' margins probably are; isn't that true?

A Yes.

Q And some retailers may in fact want to do some special cuts that the major packers can't or won't perform; isn't that right?

A Yes.

[Tr. p. 291]

Q Now it's true, isn't it, Mr. Fielding, that on balance in the beef business, and in particular the boxed beef business, a whole lot has happened since the mid '60s?

A Yes.

Q 75 to 80 percent of the customers have gone from purchasing no boxed beef to at least some boxed beef, quite a bit of boxed beef?

A Yes.

Q 75 to 80 percent of the market now is boxed beef, isn't it?

A Yes.

Q The whole business has changed. There are new players that have come into the business, and that has taken a little bit of time; isn't that right?

A Yes, yes.

Q The retailer has gone through a tremendous change; isn't that true?

A Yes.

Q The first 50 or 60 percent of the conversion to boxed beef came pretty quickly; isn't that right?

A Yes.

Q But you believe the remaining amount might take a little bit longer?

A Yes.

Q Now there are some facilities you were describing, I think, for Mr. Hanley that exist all around the country. Isn't it [Tr. p. 292] your opinion and belief that before someone will give up on those facilities and go ahead and build an integrated operation or shift to boxed beef, that it takes a little bit of time for that to happen?

A Yes.

* * * *

[Tr. p. 294]

Q Now, Mr. Fielding, Excel does not produce beef that grades below good, does it? At least not intentionally?

A We have other programs. We have what's called a blue label program, and that is a no-roll which at times I am not sure whether it's below good or not.

Q Well, it's your intent, isn't it, that that be equivalent of good?

A It's our intent that the customer knows what he is buying with that product. It is a consistent product. That is sold under a certain label. He is aware that's out of Holsteins, possibly also out of bulls, and he knows what product he is buying.

Q All right. Now, Mr. Fielding, if steers and heifers grade below good, don't you sell them out the door to somebody else?

A Normally we would.

Q And isn't it usually cows and bulls that do grade below good, standard or below?

[Tr. p. 295]

A Not always.

Q Your cattle buyers are instructed, are they not, to purchase cattle that are expected to grade USDA good or better; isn't that true, Mr. Fielding?

A Not—no, I don't think they are instructed—I don't really know how to answer that question. I think the best answer to that question might be they are instructed to buy cattle, that the normal cattle they would buy would be Yield Grade 2s and 3s that would grade good or better. They also, if we have a profitable operation by having

cattle that are below that, we can sell out the door and make a profit selling the carcasses, then they certainly would be allowed and probably ask to do that.

Q Well, it's a pretty fair rule of thumb, isn't it, Mr. Fielding, that typically your cattle buyers try to purchase cattle that are expected to grade USDA good or better?

A Yes, normally they do.

Q In fact, it's true, isn't it, about 94 or 95 percent of your cattle do grade USDA good or better?

A Yes, I think that would be correct.

Q Most of your cattle are purchased within a 75- to 120-mile radius of the slaughter plant, aren't they?

A I don't know exactly what the numbers are. I think that would be correct to make a statement like that, though.

Q And the availability of cattle within 150-mile radius of a [Tr. p. 296] slaughter plant is a factor to review in connection with the location of a new plant or the consideration of a possible acquisition, isn't it?

A Yes.

Q It was a factor, to be precise, in connection with the decision by Excel to attempt to acquire the Spencer plants, wasn't it?

A Yes.

[Tr. p. 297]

Q It would be very unusual for Excel to consistently purchase cattle from central or eastern Nebraska and transport them all the way down to Excel's plants in Friona or Plainview, Texas, wouldn't it?

A It would be unusual. We have done it before.

Q But it would be very unusual to do it consistently, wouldn't it?

A We did it consistently when Greeley was closed down, I believe, but I would have to check with our procurement department.

Q Wouldn't you characterize that as a very unusual situation?

A Yes, it was an unusual situation.

Q Now you talked about need to acquire or obtain a presence in the north, I believe, on your direct examination, didn't you?

A We said we wanted to acquire presence in the north, yes.

Q Now are you familiar with the western Corn Belt, that particular region called the western Corn Belt?

A Oh, somewhat.

Q That would be an area which could be reasonably described, I assume, as southern Minnesota, eastern Nebraska, western Iowa?

A I think so.

Q And that's an area of high density of fed cattle production, isn't it?

A Yes.

Q Is that about what you mean when you talk about the north [Tr. p. 298] or presence in the north or presence in the western Corn belt?

A I think that would be fairly correct, yes.

Q Another area of high density fed cattle production would be the high plains or Panhandle in Texas, wouldn't it?

A Yes.

Q And that's where you have some of your other plants?

A Yes.

Q Now it's true, isn't it, that the prices of fed cattle could vary significantly between the two regions?

A It will go both ways, yes.

Q Sure. Higher one time and lower another, but it could vary significantly?

A It's possible.

Q And even a 50 cent difference here per head in purchase price would be a significant difference?

A Yes.

Q Now in the spring and summer of 1983, isn't it true that western Corn Belt cattle cost about $1 to $3 per hundredweight less than Texas, from the Texas Panhandle?

A I don't really know the answer to that. I know that they may have on a live basis. As to exactly what the spread was on a carcass value when looking at the dry value of the cattle, I am not sure what the answer is.

Q You are aware, aren't you, that Mr. Watson, who is the Chairman of the Board of Excel Corporation, expressed the opinion [Tr. p. 299] that western Corn Belt cattle costs about $1 to $3 hundredweight less than the cattle from the Texas Panhandle in the spring of 1983?

A Yes. I don't know where he got those figures.

Q But he did say it, and you are aware of that?

A Yes.

Q And, in fact, the difference in cattle prices between the western Corn Belt and the Texas Panhandle, as Mr.

Watson has described it in exhibits that have been introduced in this case, was one of the main reasons Excel wanted to acquire the Spencer plant, wasn't it?

A No.

Q Would you say that one of the main reasons you wanted to acquire the plants would be ability to take advantage of price differentials that might have existed in the western Corn Belt wheher or not they were actually or literally $1 or $3 a year a head?

A Yes. At that year there are discounts there, and at that time we would like to have a plant there.

* * * *

[Tr. p. 300]

Q Mr. Fielding, we are going to try and do our very best to preserve the sensitivity and confidentiality of some of this information, so I hope you will bear with me if I fumble a little bit trying to make sure I do things the way I should here. Could I ask you please to turn to Exhibit 17?

A Okay.

Q Now, Mr. Fielding, this is a document—I think it's a long-range planning report much like the one that you've described with Mr. Hanley. This one, however, was written by Mr. Watson in 1981; isn't that right?

A Yes.

Q At that time Mr. Watson was the Chairman of the Board of Excel Corporation?

A Yes.

Q And he was an officer or the officer at Cargill that was responsible for the operations of Excel; isn't that right?

A Yes.

Q Now could I ask you, Mr. Fielding, to turn to the page of that exhibit that has in the lower right-hand corner the No. 471 which has been stamped on. That's one of our identification numbers. This is not a numbered page, unfortunately. It's [Tr. p. 301] headed "Capital Spending Estimates MBPXL." Do you have it there?

A Yes.

* * * *

[Tr. p. 302]

Q And it's your understanding that all of those capital expenditures have been allocated?

A Yes.

Q And this is a report to the Long-Range Planning Committee of [Tr. p. 303] Cargill; isn't that right?

A Yes.

Q Could I ask you to turn to Exhibit 31 now for me, Mr. Fielding?

A Okay.

Q Do you have it there in front of you?

A Yes.

Q That's a document entitled "Commitment Request" and I believe that's for the Cozad acquisition; isn't that right?

A Yes.

Q Could I have you turn to the third page of the exhibit which I believe to be a memorandum from Mr. Watson again to the Finance Committee dated February 28, 1983? Is that right?

A Yes.

Q And that was attached to the commitment request?

A I think so, yes.

Q And now you saw this commitment request; and you signed it, isn't that right, and reviewed it?

A Yes.

Q On Page 3 of that memorandum, Mr. Watson—

A Excuse me. Where are you right now?

Q Page 3 of the memorandum, sir. Page 3 of Mr. Watson's memorandum.

A Okay.

Q It bears down in the lower right-hand corner the identification [Tr. p. 304] number 1242. Are we on the same page?

A Yes.

Q Okay. Now under the heading "Plans" as to the listing of dates and the time table and the like that you see in the exhibit, there is a paragraph that starts with the phrase, "Jim Roth prepared." Do you see it there?

A Yes.

Q Now normally, Mr. Fielding, I would ask you a question just to confirm that I understood that the information or my understanding of the information in that paragraph was accurate, but I really don't want to put you in an unfair position. Do you consider the figures there which appear for the Cozad plant and the total price of the construction at Dodge City to be confidential?

A I don't think the price at Dodge City would be confidential. The price on anything that we were talking about at Cozad would be confidential, I think.

Q Well, obviously the exhibit, now you have identified it very clearly, and the plans there speak for themselves, and the dollars are in the record, so I am not concerned about putting that in the public, but I gather you have no objection if I ask you if in fact the total cost of the Dodge facility was $60 million for the slaughter and the fab; is that right?

A That's correct.

THE COURT: What was the date of that again, Mr. [Tr. p. 305] Fielding? What was the date of that expenditure?

THE WITNESS: Well, we just finished the fabrication side of it, and the slaughter side was finished about two years ago.

THE COURT: Thank you.

BY MR. HARTLEY:

Q And can you tell me, and if you like anyway, can you tell me in just general terms how that broke out, slaughter and fab?

A It was just about an even split.

* * * *

[Tr. p. 307]

Q And let's short-form this. The cost of the acquisition of the Cozad plant is accurately reflected in the commitment request that has been marked as Exhibit 31?

A Yes.

* * * *

Q Now Exhibit 25 is another Long-Range Planning Committee report, isn't it?

A Yes.

Q It's dated April 25, 1983?

A Yes.

Q It's one you wrote after you became President of Excel; [Tr. p. 308] isn't that correct?

A Yes.

Q Schedule 1—excuse me—schedule I am going to say is Schedule 2, but I confess to you that the hole punch went right through the number of the schedule, that I believe to be entitled "Request for New Allocations"; is that correct?

A Just a minute.

Q It would be on a page bearing in the lower right-hand corner the identification number 450.

A Yes. Request for new allocations.

Q Are these capital allocations, Mr. Fielding?

A Yes.

Q Now we list in much the same fashion as we saw in the earlier exhibit we talked about a number of allocations by facility; isn't that right?

A Yes.

Q As far as I can tell, at least it's not clear from the exhibit whether these allocations were in fact approved. Can you tell me initially whether the allocations listed under the plant designation Cozad was approved?

A I really don't know. We don't have any plans today, and I don't know whether that allocation was ever approved.

Q How about the allocation for Dodge City?

A I think so, yes.

Q The allocation for Friona?

[Tr. p. 309]

A Yes.

Q The allocation for Plainview?

A The packaging was the chill cooler. We have an allocation, but we are not planning on doing that right now.

Q But the allocation was approved. The funds are there if you want to do it?

A I think so, yes.

Q Rock Port?

A I am not sure.

Q How about the corporate allocations?

A I think so.

Q Would you turn to Exhibit 39 for me, please?

A Okay.

Q Now Exhibit 39 is a—well, can you identify Exhibit 39 for me, Mr. Fielding?

A It says "Memo, Proposal to Ralph Hofstad."

Q Do you know who prepared that, sir?

A No, I am not sure.

Q That concerns the Spencer acquisition, doesn't it?

A Yes.

Q And it was a memo prepared to summarize the proposal that was going to be made by Excel to Mr. Hofstad; isn't that correct?

A I really don't know. I would have to read it again. I don't recall this particular exhibit right off the bat.

Q Why don't you take just a minute to look at it. I think it's [Tr. p. 310] fairly clear from the title it's a proposal to Ralph Hofstad dated September 26, 1983, going to Excel Corporation.

A Okay. I have read it.

Q Any doubt in your mind that that is a memo summarizing the proposal to Mr. Hofstad by Land O' Lakes concerning the acquisition of Spencer plants by Excel Corporation?

A That's what it appears to be, yes.

Q In Paragraph 3 of the second page of the memo, Mr. Fielding, there appears to be a description of funds allocated to the purchase price to investment of additional capital, and to working capital; is that right?

A Yes.

Q Can you tell me whether the funds listed in that paragraph—well, first of all, is that confidential information, Mr. Fielding?

A Yes, it is.

Q Can you tell me whether or not the funds listed next to purchase price were in fact allocated?

A Yes, they were.

Q Can you tell me whether the additional capital investment listed there was in fact allocated?

A I don't know.

Q How about the working capital?

A I don't know. I would think it probably was—if I could look at the commitment—if it was included, the commitment, of course, was approved, and if I went back to the commitment, [Tr. p. 311] if it was part of that commitment, then it would have been allocated and approved at that time.

* * * *

Q Now, in fact, Excel Corporation did sign an agreement to acquire the Spencer plants, of course, and that's why we are all here; isn't that right?

A Yes.

Q And the obligations under that agreement of Excel Corporation is guaranteed by Cargill; isn't that correct?

A I am really not very qualified to get into the specifics of the agreement. I didn't write it and would go by memory on it rather than let the papers speak for themselves.

Q Well, just to make sure that the record is clear, so we don't have to worry about that down the road, why don't you take a look at Exhibit 3 for me, please, and I think the simplest way is to look at the second to last page. I think you will find that Exhibit 3 is a copy of the contract by which Excel Corporation agrees to acquire the Spencer plants.

[Tr. p. 312]

A Yes. You are looking at Page 28.

Q I am looking at Page 30, sir.

A 30. Okay.

Q And it indicates on Page 30, does it not, that Cargill, Incorporated, has unconditionally guaranteed or unconditionally guaranteed the performance of the obligations, undertakings of Excel Corporation in the foregoing agreement?

A Yes, that's what it says.

Q Now, Mr. Fielding, you can put those exhibits aside for just a minute. I expect we may come back to them, but maybe we won't need to. One of the advantages of

having an integrated slaughter and fabrication plant is that sometimes you can offset losses, for example, in the slaughter side with profits on the fabrication end; isn't that right?

A Yes.

Q And by the same token, isn't it also true that one of the advantages of having a number of plants is that sometimes you can offset losses at one plant with gains at another?

A Yes.

Q Well, let's—in order to make sure we don't run into confidentiality problems—let's go through the exhibits here. I think that will be the safest way of preserving our record. Why don't you take a look at Exhibit 68 for me.

A Okay.

Q Now on the first page after the cover sheet of that exhibit [Tr. p. 313] there are listed the combined slaughter and fab profit and loss before taxes; isn't that right?

A Yes.

Q And this a report dated September 23, 1980?

A Yes.

Q Another one of your long-range planning reports; isn't that correct?

A Yes.

Q Now I guess in light of Mr. Hanley's examination on this general subject, you won't have any objection to my asking not for specific numbers, but just to confirm that I am reading this document correctly, as to whether or not certain plants operate on loss or profit. If I stick to the generality, that won't be a problem, will it?

A I don't think so.

Q So Rock Port operated at a loss, both in overall dollars and on a per-head basis; isn't that correct?

A Yes.

Q And Dodge City operated at a loss—on a loss basis in overall dollars—and on a per-head basis, didn't it?

A Yes.

Q And the same thing with Wichita plant?

A Yes.

Q Do you recall, Mr. Fielding, whether in the fiscal year ending 1981 Excel lost money at Dodge City and lost money at [Tr. p. 314] Wichita while making money at the other three plants? Does that sound about right to you?

A I don't recall the exact numbers, but that sounds logical.

Q Now you were present in the courtroom yesterday when Mr. Hanley asked Dr. Pace about the fab at Wichita, weren't you?

A Yes.

Q The fabrication at Wichita?

A Yes.

Q Now, isn't it true that Excel consistently lost money when it shipped carcasses at Dodge City 150 miles to be fabricated at Wichita?

A Yes.

Q And that one of the reasons you decided to build the fabrication at Dodge City was simply because the transportation and other cost advantage of a plant adjacent to the source of carcasses made it uneconomic to operate the fab 150 miles away at Wichita?

A That was part of the reason.

Q It's also true, Mr. Fielding, that there may even be times when margins at all your plants, total, total margins, might be below cost?

A It's possible.

Q Now Spencer is a competitor of yours, isn't it?

A Yes.

Q And a fair estimate of their market share boxed beef, packer [Tr. p. 315] boxed beef, let's say, would be around 11 percent?

A Not today, no.

Q Was that the number that you were told by Land O' Lakes that would represent Spencer's share of the boxed beef market?

A I don't know.

Q Can you take a look at Exhibit No. 8 for me, please.

A Okay.

Q Can you identify Exhibit No. 8 for me, Mr. Fielding? Isn't this a bundle of papers that were provided to Mr. McVay of Cargill by Mr. Hofstad of Spencer in connection with the negotiation of Spencer acquisition?

A Yes, I think so.

Q So these are figures that were prepared by Spencer; isn't that right?

* * * *

[Tr. p. 316]

THE WITNESS: No. I said I didn't know.

BY MR. HARTLEY:

Q Do you have any reason to doubt that was the case, given the cover sheet on the document, Mr. Fielding?

A Maybe I am looking at the wrong cover sheet.

Q The very first page of the exhibit, sir, it will have the exhibit stamp on it.

A Okay.

Q Well, Mr. Fielding, let my try to speed things along a little bit. When I took your deposition, wasn't it true that you expressed the opinion or the understanding that these documents appear to be a packet of materials that Mr. McVay received from Mr. Hofstad in relation to the Spencer transaction?

A Yes.

Q Could you turn to the page—it's not numbered—but it bears in the lower right-hand corner our document number 642, I believe. It's entitled "Beef Division Key Distribution." Do you see it there?

A Yes.

Q And under market share Mr. Hofstad apparently indicated to Mr. McVay that the estimated box share at Spencer was 11 percent; isn't that right?

A Yes.

[Tr. p. 317]

Q Now it's true, isn't it, that in connection with the Spencer acquisition people at Excel came to conclude that there may have been as many as four to six other companies interested in buying one or more of the Spencer plants?

A Yes, I think so. Not sure exactly the number.

Q Well in fact Mr. Hofstad indicated to Mr. McVay on the very next page—this would have the identification number 643—that six substantial firms had approached Land O' Lakes to express keen interest in our assets should

we desire to sell. Isn't that what Mr. Hofstad told Mr. McVay in regard to the acquisition?

A You are reading that on 43?

Q 643, sir, under the heading "Location" the last full paragraph.

A Yes.

Q And isn't it true that Mr. Watson ultimately concluded in a report that we have listed as Exhibit No. 6, ultimately concluded or assumed that IBP, Cargill, Monfort and Valley View, which I think is another name for Val-Agri, were active buyers?

A Yes, that's his conclusion.

Q And, furthermore, isn't it true that Mr. Watson concluded that the chances were good that Val-Agri would pay $15 million, maybe $20 million for the Oakland plant alone? Do you recall that?

A Where are you reading that?

[Tr. p. 318]

Q I am referring to Exhibit No. 38, Mr. Fielding.

A 38?

Q Yes, sir. It would be on Page 4 of Exhibit No. 38.

A Page 4?

Q Yes, sir.

A Yes, that's what it says.

Q Now one of the reasons for the Spencer acquisition was that Excel was trying to obtain some of the advantages—I think these are advantages you talked about with Mr. Hanley in a general way—trying to obtain some of the advantages that come from multiple plant operations; isn't that true?

A Yes.

Q Multiple plants can provide you with more information about the marketplace, can't they, particularly in the procurement of fed cattle?

A Yes.

Q And isn't it true, Mr. Fielding, that size and market share can provide a price advantage, a price advantage in the procurement of cattle?

A I don't think so. I don't know how you are referring to that.

Q Let's go back, if we can, to Exhibit No. 4, please, Mr. Fielding. Excuse me.

Exhibit 25. I think I misspoke. I'm sorry. It's Page 4 of Exhibit 25. This is the long-range planning report [Tr. p. 319] that you wrote in April, April 25 to be exact, of 1983 to the Long-Range Planning Committee at Cargill; isn't it?

A Yes.

Q On Page 4 you are describing the advantages that some of your competitors have, and in particular in Paragraph 2 on Page 4 you are talking about some advantages that IBP and Swift might have, aren't you?

A Yes.

Q And you say that market information and price influence are those advantages, diversification and hog production is a source of valuable information for IBP and Swift. They have a better picture of available cattle supplies in the north due to plant location. Our Cozad plant will reduce the significance of this advantage. IBP has had short-term advantage with its price influence due to 20 percent market share. The 20 percent has additional impact when you consider it's double our share and almost

four times larger shift. Didn't you write that in April of 1983, Mr. Fielding?

A Yes, I did.

Q Now it's true, Mr. Fielding, isn't it, that in recent years the industry has steadily concentrated in the stronger hands?

A Yes.

Q And isn't it also true that in January of 1982 Mr. Nicholson was able to conclude that Excel did not anticipate any increase in competition within the foreseeable future for two reasons; [Tr. p. 320] poor profitability within the business and large capital requirements for new plants and equipment?

A I think he made a statement like that, yes.

Q Now would you turn to Exhibit 5 for me, please, Mr. Fielding?

A Okay.

Q Do you have it there?

A Yes.

Q Now I believe this to be a letter from Mr. McVay. What's his position at Cargill, sir?

A He is President of Cargill.

Q It's a memo from Mr. McVay to Mr. Watson who is the Chairman of Excel and Mr. Nicholson who is the President of Excel, isn't it?

A Yes.

Q And you got a copy of the letter?

A Yes.

Q And attached is a memo which I believe the letter indicates describe thoughts which were Mr. McVay's

thoughts about processing plants in central Nebraska and various studies and so forth; isn't that right?

A Yes.

Q Now Mr. McVay on Page 1 of his memo—this is the attachment now—he concluded that slaughter was a no-growth business, didn't he?

A Yes.

[Tr. p. 321]

Q And he also concluded that less efficient units continue to be squeezed out of business, didn't he?

A Yes.

Q But there were some exceptions such as IBP which would have a monopoly when it started the Geneseo plant; isn't that right?

A That's what it says.

Q He also concluded under the heading "Fabrication" presently a slow-growth business. Over time more destination fab plant and breakers will be reduced with origin fab units, but easy ones are gone. Growth much slower and more difficult from here on; isn't that right?

A Yes.

Q He stated under Excel's long-term plans that Excel needed units; didn't he?

A Yes.

Q He repeated in describing the situation in eastern Iowa and western Illinois that IBP would have a monopoly when it began the Geneseo facility; isn't that right?

A Yes.

* * * *

[Tr. p. 322]

Q You stated that Excel should be able to locate a unit to share the situation with them?

A That's what it says, yes.

Q He also stated that Excel should be established in both markets; and he is referring now to east central Nebraska and eastern Iowa and western Illinois. Should establish Excel in both markets as soon as possible. Didn't he conclude that?

A Yes.

Q And that Excel should avoid causing any substantial increase in capacity, either slaughter or fab; isn't that right?

A Yes.

Q Now, Mr. Fielding, Mr. Nicholson wrote back to Mr. McVay a few days later, December 31 of 1982, and that document I believe you will find is Exhibit 29. Do you have that in front of you?

A Yes, sir. Yes.

* * * *

[Tr. p. 323]

Q Intend to ask Mr. Fielding whether or not Mr. Nicholson concluded under Paragraph 3 on Page 2, whether or not he concluded that Excel is a non-growth business and Excel's growth is earned through the displacement of obsolete inefficient plants. Isn't that his conclusion? Isn't that his conclusion, Mr. Fielding?

A I would like to read it.

* * * *

Q But the top of the page, the fifth line. I find the sentence, "We are in a non-growth business, and our growth is earned through the displacement of obsolete and inefficient plants. [Tr. p. 324] Is that on your copy, too?

A Yes, yes.

Q Now about that same time, Mr. Fielding, Mr. Nicholson, who was then President of Excel in the long-range planning report you have already discussed with Mr. Hanley, why he expressed the opinion that it's critical that we grow in market share during the present instant in the beef processing industry. We must gain share from the leader IBP and inhibit the smaller processors' share; isn't that right? That's the report you discussed with Mr. Hanley?

A That's what he said.

* * * *

[Tr. p. 325]

[REDIRECT EXAMINATION BY MR. HANLEY]

Q And you are talking about Mr. Nicholson's new position?

A Yes.

Q And what is that?

[Tr. p. 326]

A He is the President of Val-Agri.

Q Val-Agri is the company that has just entered the market?

A Yes. They bought two plants and have been very aggressive in selling product to many of the same customers we sell to. They have been competing on the cattle procurement side of the business very aggressively, and are a significant factor in the marketplace already just in the short period of six months.

Q And he was your predecessor as President of Excel?

A Yes.

* * * *

[Tr. p. 328]

RECROSS EXAMINATION

BY MR. HARTLEY:

Q Mr. Fielding, you spent a lot of time this morning talking about Exhibit 24. I want to take just one more minute of your time. That's, of course, the report that we have been talking about, the long-range plan report submitted by Mr. Nicholson on January 24, 1983, to the Long-Range Planning Committee of Cargill, right?

A Yes.

Q Mr. Fielding, do you know if any written document by which anybody at Excel or Cargill disavowed Mr. Nicholson's statement concerning Excel's inhibition of the smaller processors' share of the market before your testimony here today?

A No.

* * * *

[Tr. p. 333]

MARK WILLIAM SMITH, DEFENDANTS' WITNESS, SWORN

THE COURT: Would you be seated, please.

What is your name, please?

THE WITNESS: Mark William Smith.

THE COURT: And what is your profession or occupation, please?

THE WITNESS: Vice President of Cattle Procurement at Excel.

THE COURT: Your title is Vice President of Procurement of Excel Company and you are based in Wichita; is that correct, please?

THE WITNESS: Yes, sir.

THE COURT: How long have you been with the company, please?

THE WITNESS: Five years.

* * * *

[Tr. p. 339]

[DIRECT EXAMINATION BY MR. HANLEY]

Q You keep track of cattle prices around the country?

A Oh, yes.

Q If they are cheaper, what do you do?

A Go there.

Q Do you ever transport cattle from Texas to Dodge City?

[Tr. p. 340]

A Quite often.

* * * *

[Tr. p. 341]

Q Have you, Mr. Smith, observed differences in prices of relatively the same type of cattle from region to region from time to time?

A Yes.

Q How do you explain those differences?

A Well, I think basically supply is one of the biggest factors. You might have a large supply in the south and virtually a very short supply in the north. Due to attitudes of [Tr. p. 342] the feeder they decided not to place cattle on feed. Weather can shorten the supply. Just a variety of things.

Q Have you observed instances where there are consistently higher prices in one region than another for periods of from six to eight months?

A No.

* * * *

[Tr. p. 347]

CROSS-EXAMINATION

BY MR. HARTLEY:

Q Mr. Smith, before I forget it, I want to follow up on the last point that Mr. Hanley made with you, and I think you indicated that this acquisition would open up the Schuyler plant and provide a market for more cattle; isn't that right?

A Yes, yes.

Q And that would be the case no matter who bought and opened [Tr. p. 348] the Schuyler plant, isn't it? It doesn't have to be Excel to do that?

A That's correct.

* * * *

Q I think you told me during the course of your deposition the other day, Mr. Smith, that you were familiar with the allegations that had been made in this case that Monfort's Grand Island plant is in a favorable cattle procurement position. Are you familiar with that general claim?

A Yes.

Q Isn't it true that you think the phrase "favorable cattle procurement" means simply in this case that Monfort is in a [Tr. p. 349] good cattle feeding area?

A I agree.

Q And doesn't that mean primarily that Monfort would have a lot of cattle to select from?

A Yes.

Q You would expect that any favorable position Monfort has at its Grand Island plant to relate more to selection of cattle than to the price of cattle, wouldn't you?

A Yes.

Q And you wouldn't even expect any advantage in the selection of cattle to last very long, would you?

A Could you repeat that?

Q You wouldn't expect any favorable procurement position Monfort might have as it relates to the selection of cattle to last very long, would you?

A Last very long if we come in, or—

Q That's right. If there is a favorable position you will come in there and buy those cattle to dissipate the effects of any favorable position, wouldn't you?

A I still think there's enough cattle to select from, but he won't have the advantage as much as he had, I will agree with that.

* * * *

[Tr. p. 353]

* * * *

Q Well, but the supply I am talking about now is the supply in the area, the immediate area surrounding the feedlot. Isn't that a factor that affects the price?

A Yes.

Q Similarly the existence of competing cattle buyers is a factor in determining how much Excel will bid for cattle, isn't it?

A Sure.

Q Now the people at Excel who work for you and others conventionally think of the midwestern cattle-feeding area and the high plains of Texas as separate cattle-feeding areas, don't they?

A Yes.

Q And you've referred, I think, in the past to those areas as the north area and the south area; isn't that right?

A Yes, that's correct.

[Tr. p. 354]

Q Now the north area would include the central and east central area of Nebraska, for example, wouldn't it?

A Yes.

Q You could also describe that north area in a general way as the western corn belt, couldn't you?

A Correct.

Q And the western corn belt I think has been defined in this case as southwestern Minnesota and western Iowa, eastern Nebraska, for example?

A Yes.

* * * *

[Tr. p. 358]

Q Mr. Smith, you have before you I think something that's marked as Exhibit 33-B. Can you describe that for the record, please?

[Tr. p. 359]

A That's a brochure, I believe.

Q Entitled "America's Beef Company, Excel"?

A Yes, sir.

Q Let's open that, and this is where I think I need to help you a little bit. In this brochure you find—excuse me, Your Honor. I can return to the podium now. In that brochure you find a map of the United States, don't you?

A Yes.

Q And there is in particular a shaded area on that map?

A That's correct.

Q And isn't that shaded area intended to depict Excel's normal procurement area for cattle?

A Yes.

Q And that's where you buy the vast majority of your cattle, isn't it?

A Yes.

Q The area that is shaded, can you describe that for me, please?

A It's taking in all of Nebraska, part of Missouri, Iowa, western Kansas, Texas, the whole high plains area. Oklahoma, Texas panhandle.

Q Now there are areas in the country, aren't there, were fed cattle production is more dense than others?

A Yes.

Q And that area would include in many respects the very area [Tr. p. 360] you just described as the normal procurement area for Excel; isn't that right?

A That's correct.

* * * *

Q Do you have Exhibit 60 there, sir?

A Yes, sir.

Q Now that is, is it not, USDA publication entitled "Geographic Market and Price for Steers and Heifers"?

A That's correct.

Q Would you turn to Page 10 of that, please, sir.

A Okay.

Q I think you will find on Page 10 a map of the United States and it's got certain seasons or regions marked, and those marked Roman numeral I, A, B and C are described on the legend here as the high density core of fed cattle production; isn't that right?

A That's correct.

Q And the area marked I-A would include eastern Colorado and parts of southwestern Nebraska and western Kansas, wouldn't it?

A That's correct.

[Tr. p. 361]

Q The area marked I-B would include South Dakota, Nebraska, most of Iowa and some of southwestern Minnesota?

A Right.

Q And the area marked I-C would be kind of the high plains area of the panhandle, Kansas and the high plains of Oklahoma, New Mexico and Texas; isn't that right?

A That's correct.

Q It looks an awful lot like the map depicting your procurement area that we saw in Exhibit 33-B, doesn't it?

A Yes.

Q Now the high density areas of fed cattle production result from favorable grain prices, things like the introduction of irrigation in Texas and reductions in the price of transporting grain because they are right there where the grain is from; isn't that correct?

A I would agree.

Q And if I was thinking about locating a feedlot, one of my primary concerns would be the availability of grain, wouldn't it?

A Yes.

* * * *

[Tr. p. 362]

Q Now we were talking earlier about the western corn belt, right?

A Yes.

Q And it's true, isn't it, that the western corn belt could be defined as a regional fed cattle market, couldn't it?

A The regional area, yes.

* * * *

[Tr. p. 365]

DONALD C. MEIERGERD, DEFENDANTS' WITNESS, SWORN

THE COURT: Would you be seated, please.

Give us your name, please.

THE WITNESS: Donald C. Meiergerd.

[Tr. p. 366]

THE COURT: And your last name is spelled M-e-i-e-r-g-e-r-d; is that correct, please?

THE WITNESS: That's correct.

THE COURT: And your occupation or profession, please?

THE WITNESS: Vice President in charge of pricing of boxed beef.

THE COURT: And the company you are employed by, please?

THE WITNESS: Excel Corporation.

THE COURT: And you are based in Wichita; is that correct, please?

THE WITNESS: That is correct.

THE COURT: How long have you held that position, please?

THE WITNESS: Since the first of March of '83.

THE COURT: How long have you been with the company, please?

THE WITNESS: It's going to be—it's right at ten years.

* * * *

[Tr. p. 370]

CROSS-EXAMINATION

BY MR. HARTLEY:

Q Mr. Meiergerd, we have been spending a lot of time during the course of this trial talking about boxed beef, and I think by now everybody knows what that is. Boxed beef was introduced, was it not, in the early 1960s or thereabouts?

A That is correct, um-hum.

Q And about 80 percent of the total steer and heifer slaughter arrives presently at the retail market or the hotel, restaurant and institution trade in boxes; isn't that correct?

A Yes.

Q So in about 20 years the boxed beef portion of the business has gone from about zero to 80 percent; isn't that right?

A That is correct.

Q And to very quickly summarize, it's true that the advantages of boxed beef include things such as labor costs, handling and storage, transportation and proved utilization of fat and bone at the slaughter facility, sanitation, shrinkage, that sort of thing?

A Yes.

Q Now it's also true, isn't it, that the real marketplace in [Tr. p. 371] your business is in the merchandising of boxed beef?

A That is a big factor involved in selling the boxed beef, yes.

Q Well, in fact, doesn't Excel compute market shares in terms of packer boxed beef, boxed beef processed by integrated slaughter/fabricator?

A Repeat that.

Q Isn't it true Excel computes market shares in terms of your share of the packer boxed beef market?

A Yes.

Q And in June of 1980, wasn't it possible for Mr. Watson to conclude in Exhibit 11 in this case that Excel had 15 percent of the boxed beef produced at the packer level?

A I am not sure.

Q Well, let's look at the exhibit. That's probably the fairest way to proceed. Would you turn to Exhibit 11. It's in the notebook there in front of you. Exhibit 11, Mr. Meiergerd, is Mr. Watson's Annual Report as Chairman of the Board of Excel Corporation from about June of 1980 for the fiscal years 1979-80, and the statement I refer to appears on Page 6 where he says, "Our percentage of boxed beef—our percentage of boxed beef produced at the packer level is estimated at 15 percent." Do you see it there under market share?

A On Page 6?

Q Yes, sir.

[Tr. p. 372]

A That is correct.

Q Now would you turn to Exhibit 14 for me, please. Go on further in your notebook there. That's a report

submitted, an Annual Report, again by Mr. Nicholson, for the fiscal year 1980-81, isn't it?

A Yes.

Q And on Page 5 of that report Mr. Nicholson refers to in the second paragraph under heading 3 MBPXL performance versus competitors, he refers to Excel's average weekly volume in slaughter and fabrication, and then states, "This constitutes a market share of 9 percent of the steer and heifer kill and 20 percent of the boxed beef market."

It doesn't say packers, it just says boxed beef market, doesn't it?

A I am not sure what he meant, but I am more inclined to go along with he probably meant packer boxed beef.

Q I hate to do this to you, but I need to have you jump all the way up to Exhibit Number 70 which is probably in one of the other notebooks.

A Number 7?

Q 70, seven-oh.

A Okay.

Q Now Exhibit 70 is another report by Mr. Nicholson. This one is a Long-Range Planning Committee report. It's dated January 25 of 1982. And if you turn to page—well, I confess [Tr. p. 373] the numbers on mine have been chopped off, looks like the third page of the exhibit. And about halfway down, to make sure we are on the same page, it says "market share." Are you with me?

A Yes, sir.

Q And here it says that "Our fabrication volume would increase to 70,000 or 23 percent of the packer processed boxed beef market," doesn't he?

A Um-hum, that's what it says.

Q If we can go back to the other notebook which I hope you still have in front of you and look at Exhibit 18. Are you there?

A Yes.

Q We are jumping around a little bit. I apologize.

A Yes.

Q This is another one of Mr. Watson's Annual Reports, and I think you will find that it was written in about June of 1982, and on Page 5 he states that "Our apparent market shares are 10 percent of fed cattle slaughtered"—incidentally, that would be national fed cattle slaughter, wouldn't it?

A Yes.

Q "And 20 percent of packer produced boxed beef," isn't that correct?

A That's what it said.

Q Now turning one more exhibit to Number 19, please. We have Mr. Nicholson's Annual Report for the same time period. On [Tr. p. 374] Page 5 again of that document, which is written in June of 1982, do you see the section entitled "Market Share"?

A On Page 5, yes, um-hum.

Q And it says, "Iowa Beef Processors now has about 42 percent of the packer produced boxed beef market in this country," doesn't it?

A That's what the document says.

Q And then it says, "We are a margin less than half their size and have 20 percent of the packer produced boxed beef market," isn't that correct?

A That is correct.

* * * *

[Tr. p. 375]

Q Well, Mr. Meiergerd, as early as 1979, right after Cargill purchased MBPXL it was true, wasn't it, that the amount of fabrication done by chain stores and middlemen was declining?

A I really don't know. I would imagine.

Q It's also true that at that time middlemen were—middlemen fabricators—were forced to shut down their plant by the economics of packer produced boxed beef?

A That might be one factor, but I think you also got some labor rates at that time that were substantially—

Q And those would have something to do with the economics of boxed beef as we see them, wouldn't they?

A Yes.

Q And it was possible, even in 1979, wasn't it, to predict that the switch from carcasses to boxed beef attendant with the high freight and high labor would virtually eliminate independent fabricators by 1982 or 1983; isn't that true?

A You say virtually eliminate?

Q Yes, sir.

A I don't know if I could agree with that completely.

Q Well, would you look at Exhibit Number 9 for me, please.

[Tr. p. 376]

A Yes, sir.

Q Do you have it there, sir?

A Yes.

Q This is a Cargill report written by Mr. David J. La Fleur. Do you know who Mr. La Fleur was on April 24 of 1979?

A He was the President of Excel—MBPXL at that time.

Q Would you turn to Page 12 of the exhibit, please. I think you will find at the bottom of Page 12 Mr. La Fleur makes a prediction and says the lack of credit, high freight costs and high labor costs will have virtually eliminated the independent fabricators by 1982 and 1983. Didn't he make that prediction back in 1979?

A He made that prediction, but—

Q Also didn't he, Mr. Meiergerd, indicate at that same time that the market for the carcass will wither away?

A Is that what you are asking me? Is it in this same statement?

Q Well, it appears on Page 15, Mr. Meiergerd. And I think you will find in the second-to-last paragraph in the middle of the paragraph there, Mr. La Fleur, the President of Excel Corporation, states that the market for the carcass will wither away, doesn't he?

A Yes, he does.

Q It was also possible as early as January of 1980 to predict that the cost advantages and economics of boxed beef produced [Tr. p. 377] by integrated firms would mean that it is not a matter of if, but a matter of when the processor puts all or just about all of the cattle in a box. Wasn't that a prediction that was made as early as January of 1980, Mr. Meiergerd, at Excel Corporation?

A Yes, by Mr. La Fleur.

Q And it was possible just a few months later in April of 1980, wasn't it, Mr. Meiergerd, for Mr. Watson to take stock of the boxed beef market, beef industry, and observe

that the integration of slaughter and fabrication at one location would continue. That 80 percent of the beef at retail stores was already boxed, and of that 70 percent was fabricated by an integrated firm, and 12 percent by old-line farms such as Morrell, Swift and Armour had central plants, and 8 percent at chain store processing? Does that sound about like the situation as you remember it in 1980?

A No.

Q Would you please look at—just a moment, please. Exhibit 13. That's a Long-Range Planning Committee report written by Mr. Watson on April 21 of 1980, isn't it?

A Yes.

Q If you turn to Page 4 I think you will find that at that time Mr. Watson expressed the view that the trend towards vertical integration of slaughter and fabrication, boning and boxing at one location will continue. Eighty percent of beef entering retail stores is boxed. Of this about 70 percent is [Tr. p. 378] fabricated by an integrated slaughtering firm. Another 12 percent is boxed by national accounts such as Morrell, Swift and Armour at central beef and pork processing facilities.

Chain stores with their own central fabrication facility account for only 8 percent, and this share is shrinking. We see further growth in the boxed beef share of the retail beef market and MBPXL should get its share.

Our major competitors are IBP, Monfort, National and Swift.

Isn't that Mr. Watson's report to the Long-Range Planning Committee in April of 1980?

A That's what this states, yes, but I don't agree with it.

Q Now in June of 1981, Mr. Meiergerd, about a year later it was possible, wasn't it, for Excel to conclude that the trend to 85 to 95 percent boxed beef continued?

A I think it was 85 to 90.

* * * *

[Tr. p. 379]

Q Mr. Meiergerd, wasn't it possible for Excel to observe in December of 1982 that the carcass market was a declining market?

A Yes, probably.

Q In 1983 it was still true that efficient chain store, breaking plants and independent fabrication plants were shutting down?

A Yes.

Q And, finally, also in 1983 it was possible for Excel Corporation to predict that in the following three years, that means between 1983 and 1986, there would be 10 percent growth in boxed beef produced by integrated slaughter/fabricators? Wasn't that the prediction that was made at your company?

A If it was I am not aware of it.

Q Wasn't it also predicted in your company that there would be a two percent decline in carcasses?

A I think I read that somewhere, yes.

Q Well, to make this a little simpler, let me show you what I am referring to. It's Exhibit Number 24, and if you look at Page 7—

A Okay.

Q Page 7, let me back up a little bit. I am sorry. Mr. [Tr. p. 380] Meiergerd, let me state for the record that

this is a Long-Range Planning Committee report dated January 24 of 1983, and on Page 7 it is stated that Excel expects 10 percent growth in origin plant produced boxed beef over the next three years, and that this growth will come from 2 percent conversion from carcass to boxed beef, a 2 percent conversion from chain stores, central breaking to origin plant, fabrication, and a 6 percent conversion from destination plant, breaking to origin plant, fabrication.

Isn't that a prediction that was made in a Long-Range Planning Committee report in January of 1983?

A By Mr. Nicholson, yes.

Q You agree, don't you, that there has been a decrease in destination plant breaking?

A Yes.

Q And that the factors that have contributed to that decrease have been relaxation of restrictions and labor contracts of retail stores, for example, in Chicago which at one time prevented retail stores from purchasing boxed beef?

A That is correct.

Q Isn't that true? You also agree, don't you, that there has been a decline in fabrication by retail stores?

A Yes, to a certain degree.

Q And that stores like A&P and Safeway have closed their central fabrication facilities, even though Safeway still has [Tr. p. 381] apparently one still open in Wichita?

A Yes.

Q We earlier referred I think to the prediction that boxed beef will ultimately account for 85 to 90 percent of the beef market, didn't we?

A Yes.

Q You don't have any reason to disagree with that prediction, do you, sir?

A No.

* * * *

[Tr. p. 383]

DAVID J. NEUBAUER, DEFENDANTS' WITNESS, SWORN

* * * *

THE COURT: Fine. Thank you.

What is your name, please?

THE WITNESS: David J. Neubauer.

THE COURT: Your last name is N-e-u-b-a-u-e-r; is that correct?

THE WITNESS: That's correct, Your Honor.

THE COURT: Pardon me, please?

THE WITNESS: That's correct.

THE COURT: And you are the President of Midwest Animal Products?

THE WITNESS: Yes, sir.

THE COURT: Is that correct, please?

THE WITNESS: Yes. And I am also an independent appraiser of meat packing facilities.

* * * *

[Tr. p. 387]

CROSS-EXAMINATION

BY MR. HARTLEY:

Q Mr. Neubauer, Midwest Animal Products runs a custom fabrication facility for Wilson; isn't that correct?

A That's correct.

Q Wilson is currently in Chapter XI bankruptcy proceedings; is that correct?

[Tr. p. 388]

A That is correct.

Q Now they provide you with the carcasses that you fabricate; isn't that true?

A Yes.

Q You don't have to worry about going out and finding and buying them; they gave them to you?

A That's correct.

Q By the same token they also handle the marketing for those products that you fabricate; isn't that right?

A Yes, they do.

Q So you don't have to worry about setting up the marketing system or structure at Midwest Animal Products; isn't that right?

A No, we do not.

Q Mr. Neubauer, the boxed beef share of the beef market has in the last 20 years gone from about nothing up to 60, 70 percent or more; isn't that true?

A I agree.

* * * *

[Tr. p. 389]

Q Okay. Well, let's move on and talk about fabrication. Now that typically means taking a carcass and cutting it up and putting it in vacuum packaging; isn't that right?

[Tr. p. 390]

A That's true.

Q And in contrast there are people called breakers who are located in cities like New York or perhaps Chicago or Los Angeles who buy carcass cow, and they maybe cut it up and sell cuts like ribs and loins to customers such as hotels and so forth; isn't that right?

A That's true.

* * * *

Q Would you turn to Page 150 of your deposition, please, Mr. Neubauer.

A I have it.

Q And I believe on that page there appears the following question and following answer. Question: "Let's turn to [Tr. p. 391] straight fabrication facilities. How many fabrication only facilities have closed during the past ten years, approximately?" Answer: "Let me discuss a little problem I have with you in a matter of definition. In our testimony today we have kind of used the classic fabricating term that is taking the carcass to be put in vacuum packaging. Almost all of it doing that. The greater portion. The reason I am talking to you about this is because we have had over the past ten years a number of people which we will call breakers, and a breaker was one that would buy the carcass cow, send it to New York or Chicago or Los Angeles, and he would cut all the ribs out, sell 50 ribs to this hotel and so many loins to that one, and they are the group, and they do some vacuum packaging more or less amount of it. They as a group have lost a lot of people because the boxed beef business doesn't need them because they could get the same products from the fabricator either located in the west or integrated in with the packing plant.

"There have not been many to my knowledge of what we call true separate fabricators like Midwest Animal Products, like Circle C or Pepper Tree Beef. There have been a few, but not the numbers the breakers were."

Do you recall being asked that question and giving that answer?

A Yes.

Q It's true, isn't it, Mr. Neubauer, that particularly in the [Tr. p. 392] last five years, since certainly the advent of boxed beef, you would estimate that 1500 breakers have closed their doors?

A I think that's a fair estimation.

Q It's also true that integrated slaughter and fabrication facilities are preferable to separate slaughter and fabrication facilities?

A Preferable in which way, sir?

Q In general efficiency and economic terms, sir.

A I agree that's a fair statement.

Q And one of the reasons that integrated facilities are preferable is freight; isn't that true?

A That's true.

Q And the reason freight is a factor is because in an integrated facility all you have is carcasses hanging inside the building, and all you have to do is push them from one section of the building to another for fabrication; isn't that right?

A That's correct.

Q But with a separate facility it's necessary to transport them loaded into a refrigerator trailer; isn't that correct?

A Yes, that's correct.

Q And didn't you have to take them to the destination, and that requires a loading crew; isn't that right?

A That's correct.

Q And at the destination they have to be unloaded, and that [Tr. p. 393] requires an unloading crew; isn't that true?

A That's right.

Q The truck has to be washed and the hooks inside have to be washed, and instead of doing it all by conveyors you have this fairly lengthy process; isn't that correct?

A That's correct.

Q Now second factor that supports the preferability of an integrated facility is that in a combined facility you have people, personnel, that can be utilized to a greater degree, and, for example, maybe one chief engineer can handle both the fab and the slaughter, whereas in separate facilities you might have to have two; isn't that right?

A Evidently the leader of the industry doesn't believe so.

Q It's your opinion that's a factor that supports the preferability of integrated slaughter operations; isn't that true?

A That's true.

Q Now a third factor is that when you have an integrated facility, the rendering system is more efficient if it is used for both the slaughter and fab than when they are separate; isn't that true?

A It depends on the size of the stand-alone facility or separated facility.

Q Well, as a general principle, isn't it your opinion that it is by far more economic and viable to have an integrated unit?

[Tr. p. 394]

A I am not sure that I would say by far. I would agree that's preferable.

Q But I gather it's also your opinion that despite the fact that's preferable to operate in an integrated fashion, it is possible for separate slaughter and fabrication facilities to compete?

A Yes, it is my opinion.

Q And your opinion in that regard is based primarily on the fact that they are out there doing it; isn't that right?

A That's correct.

Q But isn't it also true that at the present time the companies that are strictly slaughtering are losing money?

A No.

Q Losing substantial amounts of money?

A No. Not everyone.

Q Would you turn to Page 71 of your deposition, Mr. Neubauer. And for the sake of the time here today, let me just place this particular question and answer in context, and would you please make sure that I am being fair here to the record.

I think Mr. Rastello asked you a question on Page 70 concerning your anticipated testimony at trial to the effect that a new entrant into the beef slaughter and fabrication industry could construct a new plant and could compete economically, and then you indicated there were some conditions, and talked about one condition would have to be that there would [Tr. p. 395] have to be a prospect of making money at the time; isn't that right?

A That's correct.

Q And then Mr. Rastello asked you the following question: "Are we talking about the present time," and you gave the following answer, "I am not saying in the present time. Basically my information of the present time is that the slaughterers, those that are strictly slaughterers, are losing substantial amounts of money, and the fabricators are making a reasonable amount more than enough to offset the loss in the slaughter end of it."

Wasn't that your testimony, sir?

A Yes.

Q And, in fact, in the last five years isn't it true that there have probably been 60 to 80 slaughter only firms throughout the country of various sizes that have closed?

A That's true.

Q If we can, let's talk a little bit about entry into the market. I think your declaration indicates that there are several ways of entering the beef packing business, and that one assumption underlying your conclusion regarding entry is that there has to be for the new entrants a reasonably adequate livestock supply available; isn't that right?

A That's correct.

Q And the availability of cattle, or the raw material for [Tr. p. 396] this industry is important to the economic efficiencies of the plant, isn't it?

A Yes, it is.

Q And, for example, if two companies are competing for the same livestock and both pay 50¢ a pound, for example, live weight for it, and one firm has transportation costs of 30¢ per hundredweight and another has transportation costs of a dollar-thirty, a dollar more, 130 per hundredweight, then the second firm would have spent $10 per head more for a thousand-pound steer; isn't that right?

A That's true.

Q So if percentage costs like that get too high, they have a very significant impact on whether or not a beef plant is competitive, can't they?

A They have an impact.

Q It's true, isn't it, that you would recommend to one of your clients that it would—or it should locate the new integrated slaughter and fabrication plant where there are a substantial number of cattle being fed?

A We would.

Q And that would probably be somewhere west of the Ohio Valley and east of the Rocky Mountains; isn't that right?

A We have not made any recent studies in that regard, sir.

Q But that would be a pretty good estimation on your part, wouldn't it?

[Tr. p. 397]

A That would be one possibility.

Q Well, let me return to your declaration for a minute because I think in there you talk about minimum efficient size plants being about 1200 head of cattle per day?

A Yes.

Q And that's single-shift, isn't it?

A Yes.

Q Well, then, let's turn to new construction, if we may. Now there have only been two plants of substantial size constructed in the last five years, haven't there? That's IBP in Finney County and Excel at Dodge. Isn't that right?

A Beef slaughtering and fabricating plants?

A Integrated plants, excuse me.

A That's correct.

Q Now the cost of the IBP plant is estimated to be about a hundred million dollars; isn't that right?

A That's what has been reported.

Q And you don't know how many it cost to construct the Excel plant in Dodge City, do you?

A I do now.

Q You heard it in the courtroom for the first time today?

A Or in conversation with Mr. Fielding.

Q Your declaration also talks about entry into the market by acquisition or expansion; isn't that right?

A Yes.

[Tr. p. 398]

Q And I guess there really is a combination of both that you can have. You can acquire a plant and expand it as well, so they are overlapping, of course?

A Yes.

Q Not all plants are suitable for expansion, are they, Mr.—

A No, they are not.

Q And by the same token, not all stand-alone slaughter plants can accommodate the addition of a fabricating facility, can they?

A Not all of them, no.

Q And in particular whether fabrication facilities can be added to stand-alone slaughter plant would depend upon

the configuration, condition and location of the slaughter facility, wouldn't it?

A Well in line with my previous answers, yes. That is true because you cannot expand every plant, every slaughter plant.

Q That's right.

A Economically.

Q Now it's your testimony, I think from your declaration, that there are a number of plants around the country that can be expanded to an efficient size?

A Yes.

Q And that would include plants in the midwest, I assume?

A Yes.

Q States such as Illinois and Iowa?

[Tr. p. 399]

A Yes.

Q I notice that in Paragraph 7 of your declaration you refer to a packing plant in Tama, Iowa?

A Tama, Iowa.

Q Tama, Iowa. Excuse me. The Tama meat plant?

A Yes.

Q There also is a Kane-Miller plant, I think you referred to later on in the declaration, that was purchased from American Beef. Is that the same plant?

A No.

Q Different plant?

A We were owners of the Kane-Miller plant.

Q Now there's also a Kane-Miller plant in Tama, isn't there?

A Yes.

Q But that's different from the Tama Meat one; is that right?

A Well, the ane (sic) Miller plant that I am referring to was the former American Beef plant in Council Bluffs, Iowa.

Q I see. But in Tama now are there two plants, Tama Meat and Kane-Miller?

A No, Tama Meat.

Q Are they the same?

A Tama Meat, to the best of my knowledge, is owned by Kane-Miller.

Q So the Kane-Miller plant in Tama is the same one you rae (sic) referring to in your declaration?

[Tr. p. 400]

A Yes.

Q Now I have got it. Is that plant suitable for expansion? Do you know?

A To the best of my knowledge it is.

Q Are you aware that in a document that's been marked as Exhibit 29 in this case Excel looked at the Kane-Miller plant in Tama, Iowa and concluded that it would take too large of a capital expenditure to update that plant to Excel's standards?

A No, I am not aware of that.

Q Your declaration in Paragraph 7 also refers to Kenosha Beef Packers in Illinois; is that right?

A Yes.

Q Are you referring in that paragraph to the Kenosha plant in Hebron, Illinois? Is there another one?

A There's one in Hebron, and I think there is another one in Kenosha.

Q There are two plants; one in Kenosha, Wisconsin and one in Hebron, Illinois; isn't that right?

A Yes.

Q And your declaration is referring to the Kenosha plant in Illinois; isn't it?

A As I recall it, I think that's true.

Q Well, I don't want to mislead you, Mr. Neubauer. I think quoting from Paragraph 7 you refer to the Kenosha Beef Packer plant in Illinois in your declaration. Does that refresh your [Tr. p. 401] recollection?

A Yes.

Q In your opinion is that plant conducive to expansion?

A I believe it is.

Q Are you aware that in the same Exhibit 29 I just referred to, Excel reports that it looked at the plant in December of 1982 and concluded that it was not conducive to expansion?

A I was not aware of that.

Q How about the Aurora Packing Plant in Aurora, Illinois? Are you familiar with that one?

A No, I am not.

Q Are you familiar with the FDL plant in Dubuque?

A Yes.

Q Is that plant conducive to expansion?

A They have a beef slaughtering plant in that plant.

Q Is it an efficient plant? Do you know, sir?

A Reasonably so. I made an appraisal of that plant for the City of Dubuque not over a year ago.

Q Are you aware that the same Exhibit 29 I have been referring to expresses the conclusion by Excel that that plant is outdated?

A I am not aware of it, and I don't agree.

Q Now you said you thought there were plants available in Iowa and Illinois suitable for acquisition and expansion; isn't that right?

A Yes.

[Tr. p. 402]

Q Are you aware that in late 1982 Excel conducted an extensive search of the eastern Iowa/western Illinois region, and concluded that except for the Geneseo plant that IBP had just purchased, there were no other viable beef plants in that area?

A I am not aware that they made that survey.

Q Are you familiar with the Union Packing Company of Omaha?

A Yes.

Q Now they run a slaughter only plant, don't they, with a pretty big capacity?

A Yes. They have a capacity of about—well, hourly rate can go to 3[illegible]0 or 340 an hour. Probably one of the largest hourly rates in the country.

Q Now we have been talking about today in terms of daily slaughter capacity. That 360 would translate in the vicinity of 2500, wouldn't it?

A That cooler capacity is about 2400 to the best of my knowledge.

Q So that's a pretty big plant, isn't it?

A Yes, it is.

Q They don't do any fab?

A They do not.

Q Would they be a good candidate for possible acquisition and expansion into fabrication?

A Yes, they are.

[Tr. p. 403]

Q Are there other plants in Omaha that are appropriate for acquisition and expansion as well?

A Yes. Of course the reason I know that Union is available for—talked about acquisition because it's been reported that Monfort looked at it, and, secondly, we are presently in the process of drawing up a fab for it.

Q Well, Mr. Neubauer, did you know that on February 28th of 1983 Ward Watson of Excel wrote to the Finance Committee of Cargill and stated that the Union Packing Company could be bought for $7- to $8 million, but that it is in Omaha without rendering or fabrication and has limited area for expansion, and you stated that Omaha is not a desirable location for labor or fed cattle supply. Did you know he wrote that report?

A I did not know that he wrote the report. He is in error when he says it was without rendering because they have their own rendering facility. It does not have fabrication. It has adequate space to expand the facility to apply for fabrication.

Q You are joining the long list of people who disagree with Mr. Watson; is that right?

A Not that he is Mr. Watson or anyone else, you know.

THE COURT: Next question, please.

BY MR. HARTLEY:

Q Mr. Neubauer, did you know that in that same memorandum Mr. Watson indicated that Excel had looked at small kill plants in the interior of Nebraska and Kansas and concluded that any [Tr. p. 404] one of a number could be purchased in Minden, Nebraska or Lexington, Nebraska, Lincoln, Nebraska, or in Mankato, Kansas, but that also it was the opinion of Excel's engineers that these plants were not suitable for expansion in the larger competitive plants, and that their days were numbered? Did you know that?

A No, I didn't know that.

Q Did you know at the same time Mr. Watson also concluded that the Morrell plant in Estherville, Iowa would not be an attractive acquisition because the cattle supply ratio was not appropriate? Did you know that, sir?

A No, I did not know that.

Q Mr. Neubauer, did you know that after an extensive search in the last half of 1982 and in the first half of 1983, which ultimately resulted in the acquisition of Cozad plant in Nebraska, and the attempted acquisition of the Spencer plants in Nebraska and Iowa, Excel concluded that the only viable beef plants that it could acquire in the western corn belt were just those two plants, Spencer and Doug Dale Sales at Cozad. Did you know that, sir?

A I was not aware of that.

Q Mr. Neubauer, Paragraph 20 of your declaration talks about firms that slaughter both cows and bulls as well as fed cattle. In other words, they do both cows and bulls and fed cattle; isn't that right?

[Tr. p. 405]

A Yes, yes.

Q Is it a fair summary of your opinion that you think it is possible to slaughter and process efficiently both cows and bulls and fed cattle at the same facility?

A To slaughter cows and bulls?

Q Yes, and process both?

A Yes.

Q Are you aware that in December of 1982 the President of Cargill, Mr. McVay, instructed Mr. Nicholson, the President of Excel, to consider just that very thing, the feasibility of combining cow slaughter and beef slaughter and fed beef slaughter?

A I was not aware of that.

Q Well, then, are you aware that about two or three weeks later Mr. Nicholson responded to Mr. McVay's request by stating, "Combining cow slaughter processing"—excuse me—"Combining cow slaughter and processing with fed beef slaughter and processing has not proven to be an efficient operation. During the cow liquidation of 1976 and 1977 we combined a cow slaughter with fed beef slaughter in our Rock Port plant. The results of this experience were unfavorable."

Did you know that he made that report to Mr. McVay?

A I didn't know that he made the report, and I disagree with him.

Q Now, Mr. Neubauer, the papers filed in this case by the [Tr. p. 406] Defendants claim that entry into the beef business is quick and easy. Is that your opinion as well?

A Would you define "quick and easy" for me?

Q That's Mr. McVay's. I really can't define it. Do you believe in your own words that entry is quick and easy?

A Relatively so.

Q I assume that you consulted with the lawyers for the Defendants in connection with the formulation of your testimony that you filed in this case, didn't you?

A Yes.

Q Did they tell you when you consulted with them that Excel had concluded—excuse me—that Excel had concluded in April of 1981 that it would not be feasible to build new construction in the industry? Did they tell you that, sir?

A Not that I recall.

Q Did they tell you that in January of 1981 that Chairman of the Board of Excel concluded that the beef industry was a tough and complicated business in midst of structural change that makes entry of new competition unlikely? Did they tell you that, sir?

A No, they did not.

Q Were you told that on January 25, 1982, the President of Excel, Mr. Nicholson, in a report to Cargill, concluded that no increase in competition was expected for two reasons; poor profitability within the business and large capital requirements [Tr. p. 407] needed for new plants and equipment. Were you told that?

A I did recall reading that in one of the documents presented.

Q So you apparently disagree with Mr. Nicholson's conclusion?

A I do.

Q That—

A Yes, I disagree with that.

* * * *

[Tr. p. 412]

THOMAS T. STOUT, DEFENDANTS' WITNESS, SWORN

THE COURT: Would you be seated, please. What is your name, please?

THE WITNESS: Thomas T. Stout.

THE COURT: Doctor, I am going to ask you some questions, but I will ask you to face the attorneys because if they could hear you I will be able to hear you, please.

THE WITNESS: Okay.

THE COURT: What is your profession or occupation, please?

THE WITNESS: I am a Professor of Agricultural Economics at Ohio State University.

THE COURT: And you've held that position since about 1966; is that correct?

THE WITNESS: That's correct.

* * * *

[Tr. p. 417]

Q Dr. Stout, have you formulated an opinion regarding the effect of the proposed acquisition upon the competitive nature of packer procurement of fed cattle in the market area you have identified?

A I have.

Q What is that opinion, please?

A That opinion is that whether this merger occurs or does not occur, it will not have consequential effect on the competitive performance of this industry.

Q And again could you briefly explain the reasons why you have come to that conclusion?

A We have talked about a few buyers here today, but there [Tr. p. 418] are literally hundreds of packers who slaughter fed beef and regularly report to regulatory agencies in Washington, and there are thousands of sellers of fed beef, and all of these daily are engaged in the determination of prices of this product, and what goes on among the few whose names have been mentioned is definitely not done with any kind of immunity for the effect of all the others that have been mentioned.

* * * *

[Tr. p. 419]

CROSS-EXAMINATION

BY MR. McCLEARN:

Q With respect to your chart which I believe to be IIIIIII No. 2, you are going to compare the prices between Lancaster, Pennsylvania, and Colorado, Dr. Stout, could you tell me the approximate volume of cattle reflected by the line chart reflecting the Colorado prices during the period indicated in that exhibit?

A It's always—I'm always reluctant to make estimates when I know that there are data. I'm aware that the volume of livestock reported on the Colorado prices is much greater than the one reported in Lancaster.

Q Could you give me your best estimate of the approximate volumes reflected in the Lancaster data as compared to the Colorado data?

A The Lancaster data, as I understand, is a USDA report of one small terminal market and some nearby auction markets.

Q And that would reflect about how much in a daily or weekly volume, do you think?

A It accounts for about four days of activity out of every [Tr. p. 420] five-day week in that area of Pennsylvania, Dutch farm community, and it's a non-Corn Belt area which is probably relatively important in that part of the United States, but not a substantial feeding area.

Q What would your best estimate be of the volume that would move through that particular Lancaster market in the course of a week?

A I would guess several hundred head.

Q And would you make the same sort of estimate with respect to the Colorado market that's also represented on that chart?

A I would say that in a week's time there are many thousands of head involved there.

Q Probably many, many thousands?

A Yes.

Q You testified that in your opinion the acquisition that brings us here, if consummated, wouldn't have any anti-competitive effect at all on the market that you have described; is that correct?

A In that market, yes. I'm satisfied—I said no consequential effect, I think. Those might have been my words right now, which is to recognize that competitors in that area will no doubt feel the competitive effect.

Q In what way, Dr. Stout?

A Well, there are three packing plants that it's my impression are for sale because they are not being profitably managed, and [Tr. p. 421] they in turn were bought by Land O' Lakes from someone who wanted to sell them because they weren't finding them to be profitably managed, and that tends to make a—not a very aggressive competitor out of a plant, and I would imagine that those who would like to acquire those plants don't expect to have that same experience.

Q Would your opinion be the same that there would be no consequential anti-competitive effect if, for example, three months from now an acquisition of Excel as augmented by Spencer were proposed by IBP?

A And that IBP—

Q Yes.

A —would acquire Excel?

Q Yes.

A I think that most economists would be concerned about what numbers might appear in an analysis of that.

Q And the numbers that you are referring to would be the market share or concentration number; is that correct?

A Just as a matter of principle, I think that this concern would be registered out of an appreciation of economic or industrial organization theory. I think they would want to see the numbers.

Q Well, here today I regret that—I don't regret at all—but I only have you to ask, and I understand your testimony to be that if that kind of acquisition were being proposed, that [Tr. p. 422] your opinion would be that there would be something more than consequential anti-competitive effects. Is that fair, Dr. Stout?

* * * *

A You say something more than consequential?

BY MR. McCLEARN:

Q Yes. If IBP were to acquire Excel?

A I think this would be something more than an inconsequential effect on competition, but I wouldn't know that until I had had an opportunity to really examine the numbers associated with that kind of an acquisition.

Q So you are not sure as you sit here today that even an acquisition by the largest company in the business, IBP, of [Tr. p. 423] Excel—and we are assuming that Excel by that time has acquired Spencer—you are not even sure that that would have a significant anti-competitive effect? Is that your testimony?

A I can't forget the fact that there are still 526 other packers reporting to P & S, and there are others smaller yet not required to report to them because of their small size, or of the fact that the buyers on the buying side of the product, that that firm would then have to sell to would still be the same firms who I am not sure would find themselves at an inferior bargaining position with the newly merged firms even then.

Q I appreciate that you can't put those factors out of your mind, and I am perfectly willing that you not do so, but I would like you to answer my question which is you, as you sit there today, are not sure that you would find an anti-competitive effect even if IBP were to acquire Excel? Is that an accurate statement?

A I am sure that the concentration ratios would increase, that HHI indexes might then reach a height that would begin to cause some public concern.

Q I am sort of interested in your opinion, Dr. Stout. What would your opinion be as to the anti-competitive effect of a merger of that consequence?

A I suspect that I would be concerned, but I am really not willing to concede without further thought that it would necessarily be a matter of concern.

[Tr. p. 424]

Q Thank you. Who in your experience pays the transportation cost on the movement of fed cattle to the slaughter plants, Dr. Stout? Is that the seller or the buyer?

A In my judgment it would be the buyer.

Q And in any case the costs of transporting the fed cattle from the feedlot to the slaughter plant is a cost that has to be included in the ultimate production cost of the animal?

A It must be. May I explain why I made that answer to your previous question.

THE COURT: Go ahead, please.

BY THE WITNESS:

A All products have value because of their even relation to the demand for them because of their forum, the time and the place in which they are offered. To the extent that that product's ultimate value is found at the point of consumption and that it's moving toward that point and increasing in value all the way, the movement from feedlot to packers is an increase in value, and the ultimate buyer, the consumer, pays for that. It's part of the cost of creating that value.

Q And it is a cost of production?

A It is.

Q Now in Paragraph 9 of your declaration, which I gather you have before you, you conclude in Paragraph 9 that the relevant area of the country for analyzing the merger or acquisition is the geographic area that encompasses those buyers and sellers [Tr. p. 425] that significantly affect the supply and demand for product at issue. Do you have that in front of you?

* * * *

Q Paragraph 9, if you please, Dr. Stout. And I would refer you to the second sentence in that paragraph which says, "Thus on the supply side the relevant geographic market must encompass every seller, every seller who, given a price increase and so forth, would be willing and able to sell. And, similarly, on the demand side the relevant geographic market must encompass every buyer who as a result of the price increase would be willing to buy from the changing price."

And any area that does not encompass all of those sellers and buyers would be too narrow?

A Yes.

Q Is that your view?

A Yes.

Q And let me put this hypothetical to you. If you had a group, for example, of a hundred buyers, take buyers in this case, who would be affected by a price decrease and they were all within a 25-mile area—hypothetically would be better if [Tr. p. 426] I use sellers, so let's use sellers—they are all within a 25-mile area of the plant, but you have one seller who is a hundred miles away who also would choose, for whatever reasons, by reason of a price increase at the plant to sell to that plant.

Would it be your testimony, Dr. Stout, that the radius or the geographic area would have to be sufficiently large to encompass that one prior far-out who was also affected by the change in price, or would it be limited to the area where the hundred were within 25 miles?

A I am afraid I need substantial help in clarifying your question. Are we talking about these as if they were market areas or as if they were just locations within the national geographic market area?

Q Just a specific location and a specific plant. And you have got a hundred people within 25 miles who would be drawn to that particular plant if that plant changed its prices. And you have got one more who is a hundred miles away.

A One more seller?

Q Yes. And he would also, for whatever reason, decide that if the plant changed its price, that's where he wanted to sell. Now would the market for that particular purpose be the 25-mile area including the hundred people or the 100-mile area including the 100 plus the one more?

A That one hundred and first will be interested in selling to [Tr. p. 427] that buyer whenever price differentials reached the point that they will pay the freight costs.

Q So regardless if he is the only one out of that distance who would be induced to sell because of the price change by the buyer, the market has to be large enough to include him? Is that your view?

A That is the only buyer available to him.

Q Well, in my hypothetical I am assuming that he is chosen—he has chosen, for whatever reason, to sell to the plant that I have described to you.

A If that's the only plant that's available to him within that 100 miles, he will always sell to it, and the price at his location will be enough lower than the price of the other 25 to account for the difference in transfer costs.

Q In Paragraph 10 of your declaration you conclude that the relevant market for procurement of fed cattle is the entire United States. Is that correct?

A Yes. The relevant market which is defined in the context of interrelationships of prices.

Q And that's not just the area east of the Rockies, but the whole United States, correct?

A Yes.

Q And directing your attention to Paragraph 15, I understand you to say that in this market there are buyers and sellers spread throughout the country. Is that accurate? That's your [Tr. p. 428] view?

A Yes.

Q And because there are buyers and sellers spread throughout the country, in your opinion there is no logical place—again, I am paraphrasing you in Paragraph 15—there is no logical place to draw a geographic boundary line? That's your opinion?

A That's correct.

Q And that really is fundamental to your conclusion that the market is nationwide, is it not?

A Yes.

Q Now would you agree that the total—that the approximate total fed cattle slaughter in the United States in 1982 was about 25 million head?

A I will agree.

Q And would you know what the total steer and heifer slaughter in the 12-state area defined by my client was in 1982?

A Again, I will agree.

Q My question was, do you know the approximate slaughter within that 12-state area? I suppose first I ought to, in fairness, ask you if you are even generally aware of the area?

A Yes. I am generally aware of the area. I am generally aware of most of the activity of buying and selling of fed cattle that goes on in that area.

Q Okay. If I suggested to you that the total slaughter in [Tr. p. 429] that 12-state area in 1982 was about 21 million, would you disagree with me?

A I would accept that.

Q And if I also suggested to you that in 1982 the total slaughter east of the Rocky Mountains was approximately 23 million head, would you disagree with me?

A I would accept that.

Q So that approximately in the 12-state area that we have been talking about in this trial, approximately 80 percent of all of the slaughtering took place at least as recently as 1982? Would that be accurate?

A I will concede that.

Q Now as I understand your argument you make these points, and I refer you particularly to Paragraphs 13 and 15 of your declaration. And in both of those I understand you to say that local sales—and you are speaking of local sales of fed cattle, are you not?

A Yes.

Q Local sales are strong evidence of national market. Is that your view?

A I would say local sales generically of any kind of a product in a national market.

Q Local sales are indicative of a market that is national?

A Indicative, not proof. As a consequence, not cause.

Q And you have told us that because there is no logical [Tr. p. 430] place to draw the line, you conclude that the market is national?

A Yes.

Q Those are the two points upon which you base your conclusion, do you not?

A Yes.

Q All right. Now let's look at Paragraph 17 of your declaration in which you conclude, I think, that cattle are now fed primarily in the central portion of the United States. You say that, do you not, and you refer to your own Exhibit B?

A Yes.

A If I may direct you to Exhibit B, I have to tell you that my copy is not all that clear, but it purports to be—I think by the use of the dots—a representation of where cattle were fed in 1969 and where they were fed and sold for slaughter in 1978. Is that correct?

A Yes, these are prepared by the U.S. Census.

Q And both of those tables show, or at least they indicate to me—and I ask you if you agree—that by far and way the greatest concentration of fed cattle is in what has generally been described here as the 12-state area?

A Yes.

Q That's true, is it not?

A Yes.

Q And is it not also true, at least as I look at those charts, [Tr. p. 431] that there appears to be an even greater concentration in those 12 states in 1978 than there were in 1969?

A Yes.

Q Please. Doctor, the reporter can't take us both at the same time.

A I am sorry.

Q There appears to be a greater concentration in 1978 in those states than in 1969?

A Yes.

Q Now it's also true, is it not, that many slaughter plants either have followed or have been built in that same 12-state area where the fed cattle are concentrated?

A Yes, indeed.

Q As a matter of fact, Dr. Stout, can you identify for me any significant number of major fabrication plants or integrated plants, let's say those that fab or slaughter 1500 a day or more that are located outside that area, that 12-state area?

A I think it would be unwise for anyone to build anything outside that area.

Q And do you agree, referring you to Paragraph 18 of your declaration, that transportation indeed is a factor in shipment patterns of fed cattle, do you not?

A Yes.

Q And I suspect, and I am surely no student of economics, but it seems to me that a seller would be unlikely to ship an [Tr. p. 432] animal at a distance greater than the differential between the—

A Oh, definitely.

Q Please, Doctor. I haven't finished my question. They are long and not too articulate, but I've got to get them in the record. You wouldn't be likely to ship an animal farther than the cost of transportation or to a point where the cost of transportation exceeded the beneficial price differential?

A That's true.

Q Okay. Now you refer in Paragraph 19 of your declaration to a study by the packers and stockyards, do you not, I believe based on 1979 data? Is that correct?

A 1979 and '80, I think.

Q All right. And from that data you purport to draw certain conclusions as to cost of transportation, correct?

A I don't think my conclusions about transportation are drawn necessarily from that. I believe my declaration says—I hope it does—that I find nothing in that to disagree with.

Q Okay. I will accept that. Are you aware, Dr. Stout, that there has been significant increases in the federal truck permit tax since 1979?

A Would you repeat the question?

Q Are you aware that there has been substantial increases in the federal truck permit tax since 1979?

A I am not surprised to hear that.

Q But you were not aware or you can't at least furnish me—

[Tr. p. 433]

A I think I might have even presumed that would be true because of inflation.

Q And the same would be true with respect to the price of diesel fuel, would it not?

A I think correct, yes.

Q Do you disagree with Mr. Monfort's estimate that it costs about $1.25 per mile tc operate a cattle truck?

A At the time he gave his testimony I felt some reservations about part of it, but I honestly don't recall what it was. I think he referred to some concern about the cost of getting the truck back again.

Q He did refer in his testimony to back-haul, but with the basic $1.25 to run a cattle truck a mile, would you think that was fundamentally correct?

A It's in accord with what the quoted rates are per mile. That is the quoted rates would allow that cost to be covered.

Q Have you ever run a fleet of cattle trucks yourself, owned or operated or managed them?

A The closest I have ever come is to ride in them.

Q Okay. So that if Mr. Monfort says that that's what it costs him to run a cattle truck per mile, you don't have any real basis for disagreeing with him, do you?

A I have some concern about whether a feedlot needs to worry about what it costs to run a truck or a packer.

Q In Paragraph 19 you suggest that it would cost, according [Tr. p. 434] to that study, about 32 cents to move a hundredweight of cattle in, an additional hundred miles after the first 150?

A That's what the study says.

Q That's what the study says, and in your experience you found that to be reasonable?

A I did some rather careful investigation of truck transportation rates, and looking at them as recently as night before last, but I do not recall exactly the cents per mile.

Q Well, at least in your declaration you, for the purpose of this declaration, which is your sworn testimony here, you reported those figures and you testified to them, did you not?

A Yes.

[Tr. p. 435]

Q Okay. Now if it costs 32¢ to go the hundred miles per hundredweight, what would it cost to move one animal, an 1100-pound animal, an additional 100 miles, and if I

tell you that my mathematics suggested that would be $3.52, would you accept it?

A For an 1100-pound animal?

Q For an 1100-pound animal. Would you accept that that mathematics is correct? I hope it is.

A It sounds good to me.

Q Okay. And then if you moved that same animal an additional hundred miles or extra 200 miles, you would simply double that?

A No, I don't think I would simply double that.

Q You think that the cost of transportation somehow decreases after the first 250 miles?

A General freight rates are quoted lineal basis of about a dollar and quarter a square mile, but as distances increase hauls get more attractive, especially unprocessed agricultural, so that coming back empty—so the importance of backhaul would be very important, the importance of length of haul he could have without loading and unloading would be very important, and competition would enter into his negotiation, into his determination of what price to pay. I think there is negotiation.

Q Now wait a minute. I am just talking about cost of transportation.

A That's what I am talking about.

[Tr. p. 436]

Q Okay.

A I think there would be negotiation which would depart from quoted rates, and on interstate hauls these truckers are not obliged to—they are not subject to ICC regulation on rates and routes as long as it's an unprocessed agricultural cargo.

Q What do you think—no, I will withdraw that question, Dr. Stout. You indicated, however, that the ability to get a backhaul really would be an important factor in—

A That would be a great factor.

* * * *

Q And you testified, in any event, at the bottom of Page 6 that even the highest of the estimates given by the USDA study that is 32¢ is small relative to cattle prices?

A It's a small share of per hundredweight value of cattle.

[Tr. p. 437]

Q And if, for example, we just take the example we used, $3.52, and move an animal an extra hundred miles, and if the cost of that animal today was—what? $670? Would you accept that?

A I would think $65 a hundredweight would come out that close.

Q Okay.

A But I only use numbers like that because they are easy for my arithmetic.

Q Well, that's the same reason I use them. Now compared to the $650 or $670 cost of the animal, the $3.52 for the extra hundred miles is not very much, is it?

A True.

Q But if the margin on that animal, Dr. Stout, is $6 or $7, then in fact the $3.52 is approximately half of the margin, is it not?

A That's profit margin and not operating margin you are talking about, correct?

Q Correct.

A I think to the extent that these long hauls occur, they occur in response to price divergences that are unusual, and in those unusual times the packer who is receiving them goes long distances is not the only one. He has at least the solace of knowing that others are under the same circumstances.

Q Well, that's a helpful answer, but let's go back to my question. And my question to you simply is if the profit margin on a particular head of cattle that we are talking about—[Tr. p. 438]can you accept my figure of $6 to $7—then the cost of transporting that animal an extra hundred miles at $3.52 is roughly half the profit margin? Is that not so as a matter of simple mathematics?

A It's misleading for me to answer yes.

THE COURT: Answer in your own way, Doctor.

BY THE WITNESS:

A The packer is not going to go that extra hundred miles to procure over that distance under ordinary circumstances unless he can justify it by the price of cattle at that location. That is enough lower to pay that cost. He will protect his profit margin. Even if he has—he may in competitive circumstances have to forfeit some of it, but it's not going to be his regular practice to willingly—

Q To willingly give up his profit?

A —give up his profit margin just to be buying cattle a hundred miles away.

Q Because if he did that very long he would go broke, wouldn't he?

A So he would not do that unless he could justify it.

Q You refer in Paragraph 22 of your declaration to a P & S study which measured the movement of cattle in

two areas of the 12-state area that we have been talking about. One you have described as the Nebraska-Iowa area, and the other as the high plains region. Do you see that?

[Tr. p. 439]

A Yes.

Q And the P & S found, according to your testimony, significant movement of cattle between those two regions, and that's your testimony, is it not?

A Yes, and—

Q Those two areas, the Nebraska area, which we have been calling sometimes the western corn belt, and the high plains area, are the areas of greatest density of fed cattle and the greatest density of slaughter/fab packing plants; is that not correct?

A Yes, that's correct.

* * * *

[Tr. p. 463]

MICHAEL W. KLASS, DEFENDANTS' WITNESS, SWORN

THE COURT: Doctor, would you be seated, please.

What is your name, please?

THE WITNESS: My name is Michael W. Klass.

THE COURT: And you are a Vice President of Glassman-Oliver Economic Consultants; is that correct, please?

THE WITNESS: Yes, sir.

THE COURT: That means you are a colleague of Mr. Burnett; is that correct, please?

THE WITNESS: That's right.

* * * *

[Tr. p. 468]

Q What is your appraisal as a professional economist of the Plaintiff's theory?

A My appraisal which I reached after some considerable examination of economic literature and work of my own is that it is a highly unusual theory. One for which I do not find any precedent in the literature. Economic literature with which I am familiar. Nor in my experience examining some large number of horizontal merger cases.

* * * *

[Tr. p. 473]

Q For the record, I am referring to Plaintiff's Exhibit 60 entitled "Geographic Markets and Prices for Fed Steers and Heifers." Is that the document you were talking about?

A Yes, sir.

Q Now there are a number of maps in that, and earlier we were referring—earlier we were referred to Page 10 of this exhibit. Is that the map that you mentioned?

A Yes, sir, it is.

Q All right. Go ahead with your analysis. You mentioned that you talked to the authors of this document. What did you learn about their statements with respect to the types of regions mentioned in Roman Numeral I?

A Yes. On this map we see a number of regions, and there are three; Roman Number I-B, I-A and I-C which together make up areas they call the Nebraska, Iowa and the high plains areas and the Colorado area.

[Tr. p. 474]

The question that I wanted to be absolutely clear on, even though as they pointed it out to me, their study in fact is quite clear in writing, was this: Did they view this combined I-A, I-B and I-C area, which I believe is one of the markets that has been alleged by the Plaintiffs, do they believe their study indicates that this area is in fact a relevant market for assessing the relevancy of concentrations that acquisition situations, or whatever one wants to assess, and the answer that is in the report, and which I verified, was that no, that is not the case.

Their task in this study was to determine whether it was at all plausible, whether there was any economic plausibility to looking at smaller markets, and they concluded that there was no economic plausibility to looking at smaller markets. They concluded that the relevant market for assessing competition in cattle procurement was at least as large as I-A, I-B and I-C together on this map.

Q What did you determine, Doctor, to be the relevant product in geographic markets on the buying or procurement or cattle side of this case?

A Well, I first initially concluded that it was certainly—the market was certainly at least as large as areas I-A, I-B and I-C on this map because I had determined that this was really an extremely well done study based on enormous amounts of research and effort and competent work.

[Tr. p. 475]

I then proceeded to do certain investigations which in spirit, at least, and in intention were similar to those undertaken by the USDA team.

I, of course, didn't have the extensive data and years of time in which to do that work. Based on that I have

concluded that the relevant procurement area and—is certainly an area at least as large as the United States, east of the Rockies, and more—even more plausibly is the entire continental United States, and in that I am relying in significant part on the declaration and testimony of Professor Stout and on my extensive discussions with him about this matter.

Q What factors did you take into consideration then in reaching your definition of the geographic market as the market at least east of the Rocky Mountains?

A I took into account procurement patterns. I also took into account the costs of transportation, the extent of price information in the market. I took into account apparent trends and changes in transportation costs over time. I also took into account information that was available on price variations and relationships as among various parts of the price variations for cattle among various parts of the country.

* * * *

[Tr. p. 497]

[CROSS EXAMINATION BY MR. McCLEARN]

Q Let me direct you, if I may, to your written testimony in this case, and first to Page 3, Paragraph 1.3-A, if I may, in which you say that you believe that except in situations involving near monopoly market shares or market positions, an acquisition is likely to have a significant adverse effect on competitive market performances, only if the increase in concentration the acquisition causes substantially contributes to the ability of market participants to cooperate to increase prices or to decrease prices of the products they buy.

And that is part of your direct testimony; is that correct?

A Yes.

Q I ask you first, in holding to that belief, can you quantify for me what you mean when you say a significant adverse effect?

A In my view, a significant adverse effect would be one which is large enough to risk—excuse me—large enough to make the risk of foregoing the possible efficiency from the merger worth undertaking.

Q Let me stop you right there. Risk to whom, Dr. Klass? Risk to the public?

A Yes, sir.

Q And when you refer in that statement to near monopoly shares, could you quantify for me what you believe would [Tr. p. 498] constitute a near monopoly market share in your belief?

A Yes. I can try to do that. Though no general statement can be made which would apply to all industries, certainly a market share in most cases, a market share of 90 percent would be agreed to be near monopoly market share.

We would again have to define it relative to the concern that we have, and by we, I as an economist, would have with mergers. A merger. And that is that the merger would result in a worsening of economic performance, a restriction of output. And thus a monopoly share would have to be—or market position—would have to be one which would allow the single firm having that share or position to exercise such control over output that price could be raised and output restricted profitably.

Q And if I understand you correctly, if a single firm that had 90 percent of the market, or whatever the market is that it's in, could not achieve those results, then you would not find offensive to you as an economist even that degree of monopoly; is that correct, sir?

A It is correct that I would not find it offensive in terms of its likely effects on the economic performance of the market.

* * * *

[Tr. p. 500]

Q In the same statement that I referred to you, you go on to say that an acquisition is likely to have a significant adverse effect only if the increase in concentration the acquisition causes substantially contributes to the ability of the market participants. All right. Now can you quantify for me what you mean when you used the word substantially in conjunction with the word contribute in that thought?

A I can't quantify the term substantially in a general sense. I can't give a numerical answer to that. I don't think any economist could possibly do that.

* * * *

[Tr. p. 503]

Q So that if you had a market quite apart from the degree of concentration in which the firms in that market had the ability to not acting collusively, but simply by viewing each other and examining their own best interests to raise the price of their output product, to a degree higher than it would have been but for the fact that they reacted with each other's prices, and in effect in that sense acted together, you would regard that as an anti-competitive effect, would you not?

A That kind of effect is just the kind of tacitly collusive or cooperative behavior to which I have been referring.

Q But it doesn't have to be collusive in a pejorative sense, does it?

A Well—

Q That can happen—if you will let me—and I am sorry I am making a speech, and I should ask the question—that can [Tr. p. 504] happen in a situation without either deliberate or intentional collusion on the part of the firms involved; is that not true?

A Yes. It can certainly happen without the firms having meetings and dividing markets and rigging prices.

* * * *

[Tr. p. 510]

Q Can you conceive of circumstances where you, as an economist, would believe that a merger of IBP and Excel, [Tr. p. 511] Excel, assuming it's permitted to acquire Spencer, would not have anti-competitive effects?

* * * *

[Tr. p. 512]

Q Let's assume it's happening today. Do I understand your answer to my question is yes, you can conceive of circumstances where that merger would not be anti-competitive?

A Yes, and the opposite.

* * * *

[Tr. p. 519]

Q Yes. Let's say Colorado, for example. Can you think of any circumstance where it would be economically feasible to [Tr. p. 520] ship an animal from Colorado to Danville, Illinois or to a slaughter house in New York City?

A That would probably take a very substantial price depression.

* * * *

Q The truth of the matter, Dr. Klass, is, is it not, that the vast bulk of the cattle slaughtering facilities in the United States are located in the general 12-state area as we have been talking about?

A Yes, I believe that's true.

* * * *

[Proceedings adjourned on October 7, 1983 at 11:10 a.m.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Defendants Cargill, Inc. and Excel Corporation appeal to the United States Court of Appeals for the Tenth Circuit from the Orders filed in this action on December 1, 1983, and the Judgement entered in accordance therewith on December 2, 1983.

Dated this 9th day of December, 1983.

MORRISON & FOERSTER

By: /s/DAVID R. EASON
ROBERT F. HANLEY
ALAN K. PALMER
DAVID R. EASON

3100 Columbia Plaza
1670 Broadway
Denver, Colorado 80202
(303) 831-1100

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Title Omitted in Printing]

BRIEF FOR APPELLANTS

* * * *

4. Finally, the District Court concluded that if Monfort's claim were rejected for lack of antitrust injury, "*no* private individual could contest the planned acquisition. . . . The position of the defendant, if accepted, would eliminate private enforcement of Section 7. . . ." Slip Op. at 11 (emphasis in original).

The assertion is incorrect. Excel at no time has contended, as the District Court's opinion suggests, that "consumers and cattle feeders could not seek injunctive relief," *id.*, nor does its position imply that result. To the contrary, consumers and cattle feeders clearly *would* suffer antitrust injury if Monfort's theory of violation were well-founded—*i.e.*, if the increase in concentration the acquisition causes would create a reasonably immediate and substantial threat of market power and therefore, under horizontal merger standards, would violate Section 7. *See, e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962). In that event, cattle sellers and beef buyers clearly could seek to prevent the acquisition; it is they who would suffer from the lower cattle prices and higher beef prices that could emerge if, by substantially increasing concentration, the acquisition facilitated collusion. Thus, there is no question that if a violation of Section 7 were properly alleged by

cattle feeders or consumers of beef, the standards of *Brunswick* would be met.

In this case, however, both cattle feeders and beef buyers testified that the acquisition would increase competition, not that it would result in an increased possibility that the leading firms in the industry would exercise market power. In other words, they flatly disagreed with Monfort's theory of violation. In short, the record in this case illustrates the wisdom of the *Brunswick* rule. Failure to apply the rule here would result in the protection of a competitor, not in the protection of competition and the consumer interests that the antitrust laws were intended to serve.

* * * *

[Certificate of Service Omitted in Printing]

[18] The District Court characterized Excel as arguing that "unless predatory pricing or collusive activity is immiment, there can be no antitrust violation and no antiturst injury to [Monfort]," Slip Op. at 11. Excel made no such contention. Excel's position has consistently been, as stated above, that Monfort can show no antitrust injury because either it would suffer no harm at all as a result of the proposed acquisition or it would suffer harm of a type the antitrust laws were not designed to prevent. Monfort's legal theory, as the Court acknowledged, specifically disclaimed any possibility of predation or collusion. Slip Op. at 32.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Title Omitted in Printing]

REPLY BRIEF FOR APPELLANTS

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* * * *

A. Monfort Must Establish the Probability of Anti-Competitive Acts and That Those Acts Cause It Harm

Monfort's injury arguments fail to address the basic *Brunswick* question Excel has presented. Concentration, as pointed out above, normally is thought to affect competition adversely—where entry barriers are high and other factors allow—because it may enable market participants expressly or tacitly to coordinate their price and output decisions and thus harm suppliers and consumers. This is the reason concentration raises antitrust concern, and the reason "undue concentration," as Monfort says, "in and of itself," makes an acquisition unlawful. Normally, therefore, increased concentration will be met by competitors, not with alarm, but with complaisance or even delight. A competitor's fear that an acquisition may cause it harm *cannot* arise from concentration "in and of itself." It can only come from one of two sources: Either the acquisition will enable the merged firm to interfere anti-competitively with the competitor's ability to do business—for example, with the competitor's ability to do business—for example, through predation or, in a vertical merger case, by foreclosing competitors from access to competitively critical sources of supply or customers. Or the acquisition may lead to more vigorous competition. The first of these possibilities unquestionably affords the competitor a basis for

antitrust action, whether or not it prevails on the merits. The second possibility does not. Because the competitor's asserted harm results from heightened competition, its claim of injury necessarily contradicts its claim on the merits and therefore, under *Brunswick*, must be rejected. The injury is not "antitrust injury"—injury flowing from that which makes the acquisition unlawful.

Contrary to Monfort's portrayal of Excel's argument, proper application of *Brunswick* thus does not mean that a competitor of one or the other of the merging firms can *never* establish antitrust injury. It does mean, however, that a competitor cannot claim—as Monfort claims here—injury flowing from concentration "in and of itself." A competitor can invoke the antitrust laws to prevent a merger of its rivals only if it asserts and establishes that the acquisition will cause genuinely anti-competitive acts, that those acts will cause it harm, and that *those* acts make the acquisition unlawful. *See* Opening Brief at 19-21.

* * * *

3. In all of this, Monfort confuses, just as the District Court did, the critical antitrust distinction between intense competition, through cost reductions and other means, and predatory conduct. This Court and other courts repeatedly have emphasized the necessity of keeping the distinction firmly in mind. Indeed, this Court has adopted cost-based predatory pricing standards precisely to ensure that competitors cannot invoke the antitrust laws to shield themselves from competition on the merits. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). *See* Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harv. L. Rev.* 697 (1975). As Judge Breyer recently observed:

> The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals.

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (lst Cir. 1983).

Despite Monfort's vague suggestions to the contrary, the market circumstances and the evidence in this case provide no basis for concluding that the cost-price squeeze Monfort fears would be "predatory" or in any sense anti-competitive. To show that it is, Monfort points only to Excel's supposed anti-competitive intent, citing the following lines from Excel's documents:

> It is critical that we grow in market share during the present instability in the beef processing industry. We must gain shares from the leader (IBP) and inhibit the smaller processor's share.

Response Brief at 41. Nothing in this statement suggests a likelihood of predation or collusion or any other anti-competitive act. Every competitor—so long as it behaves competitively—wants to increase its market share as much as possible, taking business from its larger and smaller competitors alike. Mr. Monfort made this point succinctly:

> Q: I take it you would like to increase Monfort's present share of the market?
>
> A: Yes, I am normal.

Tr. at 125. Competitors' intense desire for market share, which the District Court and Monfort here point to as signalling competitive danger, is the very essence of the competitive process, which the antitrust laws are designed to promote.

* * * *

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 13, 1986

Mr. Robert F. Hanley
Morrison & Foerster
2000 Pennsylvania Avenue
Washington, DC 20006

Re: Cargill, Inc. and Excel Corporation,
v. Monfort of Colorado, Inc.
No. 85-473

Dear Mr. Hanley:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. Justice Blackmun took no part in the consideration or decision of this petition.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

JOINT APPENDIX

No. 85-473 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. AND EXCEL CORPORATION,
Petitioners,

v.

MONFORT OF COLORADO, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX
Volume II

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PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1985
CERTIORARI GRANTED JANUARY 13, 1986

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Def. Ex. 2C
Monfort 1982 Annual Report
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Financial Highlights
(in thousands of dollars except per share data and number of shares)

For The Year	Fiscal 1982	Fiscal 1981
Total Revenue	**$996,865**	$820,582
Income before Income Taxes	**25,581**	16,122
Provision for Income Taxes	**9,704**	7,108
Net Income	**18,907**	16,007
Net Income per Common Share	**3.84**	3.23
Stockholders' Equity at Year End	**54,804**	36,733
Average Number Shares Outstanding	**4,929,840**	4,948,534

MONFORT OF COLORADO STOCK IS QUOTED OTC-NASDAQ SYMBOL MNFT (CLOSING BID AND ASKED PRICE RANGE QUOTED BY OTC-NASDAQ DURING FISCAL QUARTERS)

	1982				1981			
	High		Low		High		Low	
	Bid	Asked	Bid	Asked	Bid	Asked	Bid	Asked
1st Quarter	6 3/8	6 1/2	4	4 3/8	6 1/4	6 3/8	4 1/2	4 3/4
2nd Quarter	6 1/4	6 1/2	4 1/2	4 5/8	5 1/8	5 3/8	3 7/8	4 1/8
3rd Quarter	6 7/8	7 1/8	5	5 1/4	6 1/8	6 3/8	4	4 3/8
4th Quarter	8	8 1/8	6 1/8	6 3/8	6 1/8	6 3/8	4 1/2	4 3/4

(The prices shown represent interdealer quotations without adjustment for retail mark-up, mark-down or commissions and do not necessarily represent actual transactions).

No dividends were paid in fiscal 1981 or 1982. As of September 30, 1982, the Company's common stock was held by 2,282 record shareholders.

Classes of Similar Products and Export Sales

The following table sets forth the approximate percentage of total sales on a consolidated basis contributed by each class of the Company's similar products.

Class of Products	**1982**	1981	1980	1979	1978
Lamb Products	**5.4**	4.4	6.3	8.9	10.8
Beef, Carcass	**9.2**	12.7	16.1	3.0	3.7
Beef, Fabricated and Boxed Primals	**62.1**	63.5	57.7	66.4	60.6
Ground Beef, By-products and other Products	**23.3**	19.4	19.9	21.7	24.9
Export Sales ($ millions)	**$36.0**	$21.5	$24.7	$36.6	$14.8

A copy of Monfort of Colorado's annual report on Form 10-K for the year ended August 28, 1982, filed with the Securities and Exchange Commission, including the Financial Statements and schedules thereto, will be furnished without charge to any stockholder upon written request mailed to:
Secretary, Monfort of Colorado, Inc., P.O. Box G, Greeley, Colorado 80632.

Third Quarterly Report to Shareholders
May 28, 1983 (quarter ended)

To Our Shareholders:

Again I have a relatively good quarter to report. Again, I will refrain from the terms "pleased", "gratified", "happy" and "enthusiastic". And, again, I am amazed at how consistently it tracks with the first and second quarter results (88¢ and 89¢ respectively) because our business certainly is not noted for consistency.

Pretax earnings of $7.75 million, aftertax earnings of $4.26 million and per share earnings of $.91 compare with last year's pretax earnings of $5.05 million, after tax earnings of $4.95 million and per share earnings of $1.01.

Obviously, the pretax earnings compare very favorably, but in last year's third quarter we used up the last of our investment tax credit carryforward which resulted in a tax liability of $97,000 versus this year's tax expense of $3.49 million. Therein lies the difference in the per share earnings decline after a 53% increase in pretax earnings.

Sales rose to $339 million from $254 million, a 34% increase. There were no startling good or bad happenings in the quarter, and I believe the Company performed as well as could be expected in a rapidly fluctuating market.

I write this letter in the fifth week of our 14-week final quarter. It will be very difficult for us to equal last year's excellent fourth quarter of $1.35 per share.

At this time, the cattle market is very weak and it appears that our Feeding Division will start suffering losses in the next week or so. We do have some hedging profits to apply against those projected losses; and if prices continue

lower there is a possibility that some of our $54 million LIFO reserve could well flow into profits during the quarter. Current packing and processing results are adequate.

We were very pleased that our production employees at the Greeley packing plant voted on June 24 against the United Food and Commercial Workers Union as their bargaining agent with the Company. This means that both of our two packing plants are non-union, since our Grand Island, Nebraska employees rejected union representation in a 1981 vote. We believe that this is good for both the employees and the Company as there have been innumerable plant closings and labor problems within our industry in the last several years. It will be the duty of the management of this Company to prove to the employees at both Greeley and Grand Island that they have made a wise choice in rejecting the union. We can only do that by being a good employer, providing good wages and benefits and stable work for what we believe to be highly productive and loyal employees.

It goes without saying that the union involved will continue to file a rash of complaints with the National Labor Relations Board. We will treat all new complaints as we have all past complaints by vigorously defending our position.

Our industry continues to go through a plethora of plant closures, acquisition and divestitures. We plan on continuing to do "our own thing", which consists of being a low cost producer of high quality produts, merchandised well. I believe that you will, in the long term, approve of our results.

Sincerely,

MONFORT OF COLORADO, INC.
/s/ KENNETH MONFORT
Kenneth Monfort
President
June 30, 1983

Description of Business

Monfort is engaged in a single vertically integrated line of business; namely, the production, transportation and sale of cattle, beef and lamb products. The principal products include beef and lamb carcasses, boxed primal and subprimal beef and lamb cuts, ground beef and individual portion cuts of beef and lamb as well as beef and lamb by-products such as hides, pelts, tallow, pet food and offal.

Cattle Feeding

Monfort has conducted cattle feeding operations for over half a century, and currently operates two feedlot locations in northern Colorado. In the 1982 fiscal year, the Company finished approximately 317,000 cattle for processing in Monfort plants located in Grand Island, Nebraska and Greeley, Colorado, or for sale directly to unaffiliated packers. With the reopening of the Greeley packing plant on March 1, 1982, cattle finished by the Company are shipped mainly to the nearby Greeley plant for processing. With that plant in operation during a full year, the total number of cattle to be fed by the Company during fiscal 1983 is expected to exceed 425,000 head.

Beef Processing

Since the 1960's, Monfort has engaged in beef slaughtering and fabricating of boxed beef. Total current production at the Greeley and Grand Island plants is 5,400 head per day, with additional daily production of 1,200 head projected by fiscal 1983 year-end. The Company processed approximately 952,000 head of cattle in the 1982 fiscal year.

Lamb Processing

In fiscal 1982, lamb slaughter and fabricating operations were performed for Monfort at San Angelo, Texas and Denver, Colorado under annual contracts with independent packers. Approximately 699,000 lambs were processed for Monfort during the year. The Company terminated its arrangement in San Angelo at fiscal year-end, and now ships lambs only to the Denver facility for processing. Monfort

also expects to re-enter the lamb feeding business on a limited basis in fiscal 1983.

Portion Foods Processing
Monfort's two portion foods processing plants produce beef and lamb convenience products for fast food, hotel, restaurant, institutional and supermarket customers. The plant in Jacksonville, Florida specializes in processing ground beef, and the facility in Greeley, Colorado prepares individual portion cut steak items.

Food Distribution
A network of 25 Company-owned food sales and distribution branches, along with independent food distributors, market Monfort beef and lamb and allied food products to foodservice and supermarket customers throughout the United States. Products are inventoried at each distribution center for delivery to local accounts. Food Distribution sales accounted for approximately 20 percent of the Company's total revenue in fiscal 1982.

Transportation
The products of the Company are transported from its various production plants to customers throughout the continental United States by Monfort's fleet of refrigerated vehicles as well as by independently-operated carriers. Although the principal objective is to assure timely, dependable scheduling of delivery service to Monfort customers, the Transportation Subsidiary also solicits backhauls from outside sources for return trips.

[Photographs Omitted in Printing]

President's Letter
To Our Shareholders:

Last year, I told you that the annual letter was far more pleasant to write than the painful one the year before. This year, it is an even greater pleasure to report the results of your Company for the year ended August 28, 1982.

For the fiscal year, I can report record earnings of $18.9 million, $3.84 per share, on record sales of $996.9 million. This compares to last year's earnings of $16 million, $3.23 per share, on sales of $820.6 million.

Pre-tax earnings this year are $25.6 million compared to last year's pre-tax figure of $16.1 million. This year, we show a $3 million extraordinary credit from utilization of tax loss carryforward stemming from our very poor year in 1980. Last year's equivalent figure was $7 million.

In addition, you will note on our balance sheet that we once again have a deferred tax figure, currently amounting to $6.5 million. That item had been eliminated from our balance sheet because of our continuing tax loss carryforward for the prior two fiscal years. This item arises from our usage of a more accelerated depreciation for tax purposes than for reporting purposes. A recalculation of tax loss carryforward and investment tax credit carryforward resulted in the restatement of our second and third quarter profit figures as you will note in the Quarterly Review Section of this report.

The net effect of all of this complicated tax reporting and accruals is that we paid no income tax this year.

Before I go into the discussion of operations, let me explain a little about certain changes in the balance sheet. Our depreciated value of plant, property and equipment declined another $1.6 million as depreciation continued to exceed capital expenditures. This occurred in spite of our shift from leasing certain equipment, including over-the-road vehicles, to purchasing of such equipment.

Purchasing Policy Implemented
My continual expectation is for lower interest rates. That, coupled with my belief that we will make better corporate decisions by buying rather than leasing, resulted in our change in policy. Our strengthened balance sheet allowed the implementation of that change.

In regard to purchasing, we have concluded that our business in particular and the whole economy in general are entering a non-inflationary economic period. We are, therefore, putting great pressure on our non-commodity suppliers either to maintain or to lower prices. We know that we cannot pass cost increases on to our customers, so we feel this action is necessary. In most cases it is working very well except for those industries that are immune from competition due to regulation. We will, in the future, take an active position against rate hikes from utilities that supply us with electricity, natural gas and telephone service as well as from governmental entities with respect to sewer and water charges and overall tax rates.

Purchase U.S. Goods

Another purchasing decision involved my instructions to our purchasing agents to buy only U.S.-made goods wherever economically feasible. This policy will stay in effect until we see a turn-around in the U.S. economy or until it becomes apparent that any particular U.S. business no longer is cost competitive with foreign suppliers.

Back to the balance sheet! Total interest paying debt was reduced to $74.2 million as of August 28, 1982 from $79.5 million on August 29, 1981 and $110.3 million on August 30, 1980. At the same time, the total of inventories and receivables increased to $173 million from $138 million last year and compared to $174 million in 1980. (for the purpose of these figures, I have considered inventory at market or cost rather than LIFO.)

This means that currently we are borrowing 37.7% of our investment in inventory and receivables compared to 57.3% in 1981 and 63.4% in 1980. We are, therefore, in a much sounder and more liquid position than we were, while, at the same time, retaining greater control over interest costs. Our intent is to continue to improve these ratios by earning money and controlling capital costs, inventory and receivables.

Now, let me report to you on our various profit centers as I did last year:

Beef Processing, Grand Island

Strong earnings from the Grand Island, Nebraska Packing Plant continue to reflect the efficient productivity of that operation. In fact, we plan to expand the facility to increase production capacity from the current 3,200 head of cattle per day to 3,700 head. Construction already is underway on the $6.5 million expansion project to modernize the slaughter area, construct a tempering cooler for an additional 900 carcasses and provide additional processing facilities for rendering, hides and blood drying. Additionally, the project will include construction of a new Food Distributing Company branch facility on the plant property.

The community is enthusiastic about the expansion of the plant and the resulting increase in the workforce, especially since some long-time employers in Grand Island unfortunately have had to react to the economic downturn by laying off personnel. It was a pleasure to read the *Grand Island Daily Independent's* favorable editorial response to the Company's expansion announcement, which said, in part:

"That news offers a positive economic note at a time when there are all too few positive developments. It offers a vote of confidence for Grand Island and the local work force, and additional assurances of a viable, local market for area cattle feeders.

Very quietly, Monfort has become the largest employer in Grand Island, a circumstance that would not have been widely predicted when the company bought the plant from Swift. Monfort has approximately quintupled the Swift work force, by switching from a carcass processing operation to a boxed beef plant."

Beef Processing, Greeley
The smooth manner in which we were able to reopen the Greeley Packing Plant on March 1, 1982, following a two-year shutdown, is a tribute to our managers and staff. Utilizing Grand Island as a training ground for new supervisors and other management staff, we moved Greeley into fairly efficient and high volume productivity within a short time. And, we were able to accomplish it with minimal effect on the Grand Island operation.

By the end of the fiscal year, we were processing 2,200 head a day in Greeley on a single shift, plus 3,200 head on a double shift in Grand Island for a total of 5,400 head per day. Within the near future, we expect to reach our goal of 2,900 in Greeley and 3,700 in Grand Island for a total of 6,600 head per day.

Although Greeley showed losses for the year, these start-up losses were below budget and the year ended with losses under what we would have had with the plant closed for the entire year.

Cattle Feeding and Feedlots
Under our organizational structure, the Feedlots Division feeds cattle on a custom basis for our Cattle Feeding Division, which buys feeder cattle and sells fed cattle principally to the Greeley Packing Plant. Obviously, the reopening of the Greeley plant provided the opportunity to expand both these divisions as far as cattle numbers; and, more importantly, to reduce shipping costs of fed cattle to slaughter from our northern Colorado feedlots. At the same time, the cumulative effect of feeding efficiency and periodic hedging, as well as a turnaround from the poor margins in the industry during the previous year, enabled the total feeding operations to make the most significant contribution to Monfort's fiscal 1982 profitability. These earnings were the "highlight" of the year.

Lamb
Despite generally narrow margins, the Lamb Division reported a nominal profit for the year from sales of lamb

processed for the Company under contracts in both San Angelo, Texas and Denver, Colorado. In order to concentrate such operations more efficiently in Colorado, we terminated the San Angelo contract in September, 1982, and now are processing lambs under contract only in Denver. To supplement the supply of slaughter lambs to that plant, the Company will return to lamb feeding after having discontinued feeding a year ago because of poor margins at that time. We expect to process approximately 650,000 lambs annually in Denver, thus continuing our role as a significant producer in the domestic lamb industry.

Portion Foods, Greeley
Expansion into production of fresh steaks to complement the packaged frozen product enabled us to expand volume and strongly contributed to a profitable year. Portion Foods sales should increase in the current fiscal year.

Jacksonville
Optimism also prevails at our Jacksonville Ground Beef Plant, which turned the corner to profitability for the first time since that operation was initiated nearly four years ago. With additional new accounts and increased sales volume to major current customers, the opportunity for continued success is available. In the near future, we shall supplement Jacksonville production by resuming similar ground beef operations at our Greeley Packing Plant, where some equipment utilized prior to the shutdown two years ago is mostly in place. This will enable the Company to provide packing plant customers with shipments of ground beef directly from Greeley as well as expanding our customer base for these products in the West.

Food Distributing
The volume of food purchased for conventions, restaurants and other "eating-out" events and establishments was down due to the national economy. And, even though our Food Distributing Company subsidiary bucked the trend with record sales, it was unable to set any record for profits because the buyers' market trimmed expected nor-

mal margins. However, earnings from this division increased over the previous year while sales volume rose approximately 23 percent to a record $180 million. Food Distributing revenue now represents nearly one-fifth of total Company sales.

With consolidation of branch operations in Southern California and Oklahoma, we improved both sales and distribution efficiencies in those areas, even though it reduced the number of branches from 27 to 25 nationwide. After acquiring a new branch facility in Huntington Beach, California, it was consolidated with the branch at Long Beach into one location at Huntington Beach. Improved operations also were realized in Oklahoma with consolidation of the Tulsa and Oklahoma City branches into our Company-owned facility in Tulsa.

Transportation

As the result of the depressed state of the economy and continued deregulation, excess capacity nationwide in the trucking industry put great competitive pressure upon Monfort Transportation Company. Yet, our Transportation Company managed to report modest earnings, although less than those reported a year ago. The reopening of the Greeley Packing Plant provided a boost for the Transportation Division in volume, backhaul capability and efficiency.

Construction

For several years now, we have utilized our own construction crews on projects within the Company, such as building the beef fabrication addition at the Grand Island Plant in 1979. But this year we decided to seek outside business, and, as a result, the Construction Division exceeded its targeted earnings for the year. Currently, Monfort construction crews are engaged on a $15 million project for a packer in southwestern Kansas as well as on Monfort projects at Grand Island and Greeley. We also expect to compete for other construction business in the food industry in years to come.

Pet Foods

With the acquisition of a rendering facility from Midwest By-Products, Inc. near Grand Island, the Company was able to expand its Pet Foods Division to a second location. This operation will provide additional raw material for the various products also manufactured at the Pet Foods Plant located in the Greeley area.

Stock Purchase

The Company has purchased a small amount of the outstanding common stock of Monfort of Colorado on the open market during the fiscal year and to date. These purchases, at market prices on the date of purchase, include 146,700 shares on the open market, 80,000 shares from the family of a recently retired director and 200 shares from a private charitable foundation. Considering present economic conditions, we will continue to make these purchases, to the extent authorized by the Company's Board of Directors, as long as we feel prices of the stock warrant such investment.

Conclusion

I wish to emphasize the tough nature of our business. Even though this letter reports a record year for earnings, we cannot afford to rest on our laurels in an industry that may well be one of the most competitive and efficient in the world.

The United States is the world's breadbasket, the world leader in agriculture productivity and the number one exporter of food products. Our Company is proud to be a part of that activity as a producer of livestock and meat. Therefore, we must compete with the best producers in the world, those who operate in this country.

However, to maintain that world leadership, food producers and processors must continue to find ways of reducing costs and improving efficiency. It wasn't too long ago that the world looked to this country for leadership in automobile and steel production. Not so today. There are a

number of factors responsible for this, including high taxes and increasing governmental regulations; but U.S. industry permitted other costs to get out of control while competitors world-wide steadily became the low cost producers.

We have seen similar factors at work both in the cattle feeding and meat processing industries. A number of marginal operators have been squeezed out of cattle feeding during the past several years. Periodically, we read of meat packing plants being closed down or on strike because some unions won't accept wage freezes or reductions. Other packers just manage to keep their doors open as a result of agreements to either freeze or cut wages, or both. The final result of this turmoil possibly will be the further elimination of marginal producers, leaving only the low cost operators.

At Monfort, we continue to review all costs carefully. For example, salaries of our corporate officers and a number of other management staff were frozen for this year, and we have instituted wage freezes in the few union contracts within the Company. No labor contracts with the Company will expire until late in 1984. Although, currently, there are pending proceedings before the National Labor Relations Board, the vast majority of our hourly and salaried employees are not represented by any union. For this latter group, which includes production workers in both packing plants, we have established a Profit Sharing program to be paid at the end of each fiscal year based upon both corporate-wide and profit center profitability and efficiency. We believe a profit sharing bonus is ideal for our business because one of its purposes is to stabilize wages while enabling employees to prosper when results are positive.

Let me close this letter by restating my final paragraph from last year's stockholder letter, which continues to be our planning and operating philosophy:

"That, then, is a look at our performance for the year, plus some current information and future plans. We have survived and we are now looking once again at expansion of current operations. But, it will be restrained growth that is responsive to market conditions and limited by our financial resources. We are a good, tough, lean and hungry Company in a competitive business. I feel very good about our future. I hope you do."

Sincerely,

/s/Kenneth Monfort
Kenneth Monfort
President
November 16, 1982

[Photograph Omitted in Printing]

Summary of Consolidated Operations
Monfort of Colorado, Inc. and Subsidiaries
(tabular data in thousands except per share amounts)

	Year Ended				
Operating Results	**August 28, 1982**	August 29, 1981	August 30, 1980	September 1, 1979	September 2, 1978
Net Sales	**$995,941**	$816,563	$755,425	$621,659	$450,878
Other income (1)	**924**	4,019	288	538	418
Cost of products sold	**941,321**	773,529	749,371	599,644	431,458
Selling, administrative, and general expense	**18,452**	14,640	16,134	14,512	10,856
Interest expense	**11,510**	16,291	15,554	10,057	6,013
Income (loss) before income taxes and extraordinary credit	**25,581**	16,122	(25,346)	(2,015)	2,969
Federal and state income tax provision (credit)	**9,704**	7,108	(1,483)	(1,838)	1,049
Income (loss) before extraordinary credit	**15,877**	9,015	(23,863)	(178)	1,920
Extraordinary credit—utilization of tax loss carryforward	**3,030**	6,992	-0-	-0-	-0-
Net income (loss)	**18,907**	16,007	(23,863)	(178)	1,920
Weighted average number of shares outstanding	**4,930**	4,948	4,948	4,948	4,948
Income (loss) per share of common stock before extraordinary credit	**3.23**	1.82	(4.82)	(.04)	.39
Extraordinary credit—per share	**.61**	1.41	-0-	-0-	-0-
Net income (loss) per share of common stock (2)	**3.84**	3.23	(4.82)	(.04)	.39
Cash dividends per share	**-0-**	-0-	.06	.12	.09
Financial Information (at year end):					
Current Assets	**123,189**	99,947	108,288	115,569	95,071
Current Liabilities	**102,220**	93,137	126,298	96,946	69,208
Total Assets	**190,546**	150,336	170,130	175,067	134,827
Long-term Debt	**16,995**	20,467	22,460	31,068	16,627
Stockholders' Equity	**54,804**	36,733	20,726	44,886	45,608

1) Other income for 1981 includes the gain on the sale of the Cozad elevator in the amount of $2,340,000 and equity in income in The Monfair Company (50% owned) in the amount of $518,000.
2) Net income (loss) per share of common stock is computed using the average number of shares outstanding for the respective periods.

[Pl. Ex. 2, Def. Ex. 2J]
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (d)

OF THE SECURITIES EXCHANGE ACT OF 1934

For the Fiscal Year Ended August 28, 1982

Commission File Number 0-5322

MONFORT OF COLORADO, INC.
[Remainder of Cover Page Omitted In Printing]

* * * *

Products

Monfort and its divisions and subsidiaries are engaged in a single vertically integrated line of business: namely, the production and sale of beef and lamb products. The principal products produced are beef and lamb carcasses, boxed primal and subprimal beef and lamb cuts, chopped and ground beef, individual quick frozen beef patties, individual portion cuts of beef and lamb, and beef and lamb byproducts (such as hides, pelts, tallow, pet food meat, and offal products, i.e., the parts of the animal other than the carcass). Beef and lamb products and byproducts are sold to domestic customers and to foreign customers through the Company's wholly-owned domestic international sales corporation, Monfort International Sales Cor-

poration. In addition, as a byproduct of the normal rendering process, at its two beef packing facilities at Grand Island, Nebraska and Greeley, Colorado, the Company produces large quantities of crushed, clean, cattle bone gelatin for sale to manufacturers of gelatin products and dried blood for sale to manufacturers of feed additives and for other uses.

The following table sets forth the approximate percentages of total sales on a consolidated basis contributed by each class of the Company's similar products:

Class of Products	1982	1981	1980	1979	1978
Beef, Carcass	9.2%	12.7%	16.1%	3.0%	3.7%
Beef, Fabricated and Boxed	62.1	63.6	57.7	66.4	60.6
Ground Beef, Byproducts and Other Products	23.3	19.4	19.9	21.7	24.9
Lamb Products	5.4	4.4	6.3	8.9	10.81

The Industry

As a vertically integrated beef and lamb producer, the Company has competitors at all phases of its operations, including the procurement of raw materials and the sale of its finished products. The principal competitors of the Company vary according to geographic locality and phase of business. Monfort competes with other feedlots with respect to the purchase of feeder cattle and feed. Its packing operations compete with other beef and lamb packers for the purchase of fat cattle and lambs for slaughter, and its ground beef and portion operations compete with other processors for the purchase of lean meat and beef subprimals. The Company competes for the sale of its beef and lamb products with other packers, processors and purveyors on a national level. Additionally, Monfort's beef and lamb products compete with pork, poultry and seafood products for consumer preference.

The Company believes that nationally it has approximately ten major competitors in the beef packing/fabricating industry and approximately five major competitors in the lamb packing/fabricating industry. The largest of the Company's competitors in beef products, like Monfort, produce predominantly boxed beef. As of the fiscal 1982 year end, Monfort and two other packers ranked as the third largest beef packers, based on number of head slaughtered. During the 1982 fiscal year the Company slaughtered approximately 3% of all domestically produced beef (up from 2.5% for fiscal 1981) and approximately 12% of all domestic lambs slaughtered (up from 10% for fiscal 1981).

The labor intensive packing/fabricating industry is a commodity business which operates generally on slim margins. The Company believes that during the last several years the more successful industry competitors for sales of primal and sub-primal boxed cuts have been those packers who have contained operating costs, particularly wage rates. In recent years certain old-line packers operating slaughter/fabricating plants under master labor agreements with high wage rates have closed some plants permanently and sold others which later have reopened under new ownership with more favorable wage rates. During the fiscal 1982 year, several packers successfully negotiated or otherwise imposed wage freezes and benefit concessions in order to contain production costs. Monfort believes that the prevailing wage rates and benefit packages at its production facilities and its operating costs generally are competitive within the industry.

While packers normally receive payment for products sold within approximately 14 days, government regulations require that packers pay for slaughter cattle and lambs within 24 hours following the time the purchase price is determined. This disparity requires packers to maintain large working capital requirements. In addition, the Company's need for working capital is increased by its pur-

chase of feeder cattle and the feeding of cattle for an average of approximately 140 days. Since meat products are perishable commodities, inventory accumulation and the potential for developing a backlog of orders is limited throughout the industry.

In recent years, as in the first half of the 1982 fiscal year, the Company maintained high levels of direct borrowings. Prevailing high interest rates throughout that period adversely affected the Company's unit costs of production at its beef packing facilities as compared to less-leveraged competitor packers. During the latter part of the fiscal 1982 year, reductions in the prevailing interest rates coupled with the ability of the Company to reduce the extent of its borrowings because of profitable operations, and, a shift of borrowings under the Restated Agreement from direct line to less costly Eligible Bankers Acceptances, significantly decreased the effects of borrowings on Monfort's unit costs of production. In addition, at the commencement of the 1982 fiscal year, Monfort entered into arrangements with an unaffiliated third party for the custom feeding of substantial numbers of cattle at the Company's feedlots and the subsequent purchase of these cattle at the end of the feeding cycle. As a result of the equity deposit requirement under these arrangements, the Company experienced interest cost savings in connection with the financing of its feedlot inventory as compared to prior years. (See section entitled "Recent Developments" in Monfort's annual report on Form 10-K for the fiscal year ended August 29, 1981, which section is incorporated herein by reference, for information regarding these arrangements).

In fiscal 1982, as in other recent fiscal years, competition between packers for fed cattle was intense. The increased production capacity of two of the nations largest beef packers who commenced operations in the Kansas area in fiscal 1981, heightened competition for fat cattle in Colorado, Kansas, Nebraska and other neighboring

states. As a result, cattle were marketed generally after fewer days on feed as compared to prior recent years, resulting in a slight reduction in the availability of higher value "choice" graded cattle.

Competition within all aspects of the meat packing and distributing industry is price and quality oriented. The Company believes that it is able to compete on at least equal terms with its competitors in the industry with respect to price and quality of its products. Name recognition and product identification are important to the customers of the Company's food distributing operations. There is less importance to name recognition associated with the Company's retail customers for fabricated boxed beef items. These items are primarily sold to supermarket chains for further processing and ultimate sale to the consumer.

The Company is subject to fluctuations affecting the industry and beyond its control, such as reduction in the supply or increase in the cost of fat cattle, feeder cattle, fat lambs, feed and the price of finished products. Historically, the cattle industry has experienced cycles during which cattle supplies and the price of cattle fluctuate markedly during the course of the cycle. Supplies of lambs are currently low; however, there are indications that numbers of lamb may increase in the next few years. Placements of cattle on feed during the fiscal 1982 year increased as compared to prior recent years and the Company believes that the supply of fat cattle will be adequate for industry needs throughout the fiscal 1983 year.

Cattle and Lamb Feeding; Purchase of Fat Cattle

Monfort has continuously conducted cattle feeding operations since 1930. Cattle feeding operations are currently conducted at two feedlot locations at Gilcrest and Kuner, Colorado having a combined capacity of 200,000 head. Lamb feeding operations, which were temporarily phased out in April, 1981, had been conducted since the mid-1960's at feedlots owned by unaffiliated parties.

In response primarily to the reopening of the Company's Greeley packing and fabricating facility, improved profit margins in the cattle feeding industry generally during the latter half of the fiscal 1982 year, and, to a lesser extent, certain custom feeding arrangements with unaffiliated parties, occupancy at Monfort's two feedlots increased by 12.5% over the prior fiscal year. The combined average daily number of head on feed increased to approximately 126,000 in the fiscal 1982 year from approximately 112,000 in the fiscal 1981 year and compared to 140,000 in fiscal 1980. As a further effect of the reopening of the Greeley facility, the Company ceased marketing fat cattle from its feedlots to unaffiliated packers during the latter half of the fiscal year. Of the total number of cattle finished to slaughter weight at Monfort's feedlots in fiscal 1982, approximately 44% of such cattle provided raw material for the Company's Greeley packing operation, while approximately 28% were slaughtered at the Grand Island packing facility, and approximately 28% were marketed to unaffiliated packers. In contrast, in the 1981 fiscal year approximately 55% of such finished cattle were marketed to unaffiliated packers with the balance of such cattle transported to Grand Island for slaughter.

Aggregate Number of Head of Cattle Finished to Slaughter Weight

Fiscal 1982	Fiscal 1981	Fiscal 1980	Fiscal 1979
317,167	286,627	314,722	417,252

The combined production of the Company's Greeley and Grand Island packing plants will require Monfort to supply from its feedlots and purchase from local feeders in excess of 1,000,000 fat cattle during the next fiscal year.

The Company's cattle feeding operations are dependent upon the availability of live feeder cattle, feed grain and silage. Feeder cattle are normally purchased at weight of

725 to 800 pounds from individual ranches, auctions and public stockyards throughout the Western United States.

During the year, Monfort's feedlots supplied approximately 64% of the fat cattle requirements of the Company's Greeley beef packing operation and approximately 13% (down from 30% in fiscal 1981) of the requirements of the Company's Grand Island beef packing operation. Monfort's Grand Island plant continued to purchase the majority of its fat cattle requirements from feeders, auctions and public stockyards in Nebraska. Thus, the Grand Island packing facility is more dependent than its Greeley counterpart upon the supplies of fat cattle in the surrounding area and its ability to purchase sufficient fat cattle for its operations at competitive prices.

For many years the Company has been successful in purchasing all of its feeder and fat cattle requirements at current market prices. Market prices for cattle have varied to a degree based upon location, weather conditions and their effect on available numbers and condition of cattle. At the present time it is impossible to determine whether the supply of feeder or fat cattle will remain adequate for future industry needs or in the areas surrounding the Company's packing plants. It is also not possible to predict the impact on future market prices of any change in numbers of available cattle on feed and increased competition for such cattle, particularly from several large packers in the Kansas area.

Monfort purchases the bulk of its feed grain requirements (principally corn) in Nebraska and Colorado and transports it directly by railroad and truck to its three grain storage elevators at Gilcrest, Kuner and Greeley. The price and availability of feed grains are affected by crop production, grain exports and competition from other users such as pork, poultry and dairy producers and, more

recently, manufacturers of ethanol, fructose and other starch products.

* * * *

Pl. Ex. 33A
YOUR BEEF GUIDE FOR THE 80'S

CATTLE PROCUREMENT

Grain Fed Cattle

Excel buys and processes only grain-fed cattle. And because of our size, we need to buy approximately 13,000 cattle every day, nearly 3,000,000 a year. That's why our plants are located in the heart of America's beef feeding region—the High Plains. More than 60 percent of the grain-fed cattle are finished in this area.

This location gives us access to an abundant supply of quality cattle year round. We are able to maintain strict selection standards because we know we're choosing from the best cattle available.

All of our cattle are bought from the very finest commercial and farmer/feeder feedlots—where finishing cattle with superior quality and Yield Grades is given top priority. The best feedlots are those that have better access to quality feeder cattle, have developed sophisticated management control programs and don't overfeed their cattle when grain costs are low. Overfeeding leads to added poundage, mostly fat, which dramatically lowers the yield.

Strict Buying Specifications

Our cattle selection process requires smart buying and high volume buying. It's built around a strict set of specifications followed by *all* of our buyers:

- Our buying program is based on steers. We take some heifers when cattle numbers are down, but heifer purchases are minimal.

- Steers must weigh from 1050-1150 lbs. live weight and yield carcasses from 600-800 lbs. Breeding lines are carefully considered and buyers always look for genetically superior cattle that will receive the highest Yield Grades. The combination of genetically superior cattle and carefully controlled feeding programs produce consistent quality and high yield.
- Only Yield Grade 1, 2, and 3 cattle are sold under our Excel and Circle E brands. Yield Grade 4s are boxed and sold under the Santa Fe brand. Yield Grade 5s, as well as extremely light and heavy carcasses, are sold to other processors.
- To maintain our consistent buying standards, all of our cattle buyers receive a profit and loss statement that reflects the net effect of their quality and Yield Grade buying decisions on every lot of cattle purchased. This monitoring system allows every buyer to continually sharpen his judging and buying skills.

Forward Cattle Contracts

Excel has pioneered a new program for the purchase of grain-fed cattle called Forward Cattle Contracting. This program allows a feeder to secure a locked-in price or price/basis relationship for the cattle he will finish and deliver to us. A Forward Cattle Contract can be written anytine while cattle are on feed. When the cattle are priced, the feeder knows, subject only to quality and yield requirements, exactly what the cattle will bring when they reach market weight.

Many feeders have been very receptive to this new program and an ever-growing percentage of our cattle are being purchased this way.

Production Facilities

Excel's modern, efficient slaughter and fabrication facilities are located in the heart of America's beef-feeding

region—the High Plains. By locating here, freight costs as well as cattle shrinkage and bruising are significantly reduced. Live cattle aren't shipped long distances to reach our processing plants. When our costs are reduced, your price can be reduced as well. We are committed to the production of high quality beef products that promise, above all, consistency in cut and quality. Here are some of the key features of our slaughter and fabrication facilities:

Slaughter

- Quality Assurance plays a key role in all of our slaughter facilities assuring that the carcasses are correctly evaluated for Yield and Quality Grades and that fabrication receives the specific carcasses requested.
- We are testing "electrostimulation" to accelerate carcass chilling and meat tenderizing.
- We are using cattle restrainers in selected plants to reduce labor costs and effectively immobilize and hang cattle.
- All of our slaughter plants utilize anti-bacterial misting that rinses bacteria off the carcass during the chilling process, reducing the possibility of cross-contamination in the cooler.
- Automated hide processing is used, including chrome-tanned leather.
- All plants employ a unique sanitation design that allows for concise quality control and easy clean up.
- Continuous rendering systems are used in conjunction with modern air pollution control systems.
- Automated by-product washing systems are used which result in cleaner products, using less water.
- All of our slaughter facilities use heat recovery systems that maximize energy efficiency.

Pl. Ex. 51

FORBES, JUNE 22, 1981

Analysts may cluck and theorists shake their heads, but Occidental's Armand Hammer knows a good thing when he sees it.

Those simple, barefoot boys from Iowa Beef

By James Cook

FEW MAJOR COMPANIES have generated more scandal in recent years than Dakota City, Nebr.'s Iowa Beef Processors. The company's reputation was badly tarnished a decade ago by its collusion with organized crime, and since then it has been charged with everything from attempting to manipulate the live cattle and dressed beef markets to conspiring to create a monopoly.

Yet none of these charges can diminish the stunning success IBP has achieved in recent years and achieved on its own merit. In just 20 years, it has come from nowhere to oust giant Swift & Co. from first place not simply in beef-packing, but in meat-packing of any kind. It has revolutionized the beef-packing end of the business and may soon do the same for pork. With every year that passes it comes closer to dominating meat as thoroughly as AT&T does telephones, IBM computers or General Motors autos.

Achieving something like this in a new industry—data processing, for example—is fairly common; to do it in an

old, some would say ailing, industry is an achievement of a different order, and no less spectacular.

IBP earned over $53 million last year, on sales of $4.6 billion, posting its tenth consecutive increase in earnings. Overall, it returned over 18% on its capital and 22.3% on its stockholders' equity, one of the best returns in the food business. In 1981's first half, despite heavy startup costs on a major new plant, earnings were up another 26% on a 9% increase in sales.

Shortly after it was announced that Occidental Petroleum was acquiring Iowa Beef, the *Wall Street Journal* quoted a number of disapproving analysts. Where's the synergy? one analyst asked. Was Armand Hammer just looking for fast earnings to throw against some expiring tax credits? Another analyst said the move didn't make strategic sense. Armand Hammer must have smiled when he read all that. Better than any security analyst, he knows a good thing when he sees it.

Hammer and his associates aren't the only ones who have recognized what an efficient machine Iowa Beef has become. Both the United Food & Commercial Workers International Union, which represents 80% of the industry's 158,000 employees, and Iowa Congressman Neal Smith talk as if an IBP monopoly were already in place. Smith has been trying for some years now to push a bill through Congress that would, among other things, limit a packer's market share to 25%. The congressman, in effect, wants to pass a law against success. Yet neither the Justice Department nor the Department of Agriculture has so far been able to sustain the monopoly charge, any more than the Federal Trade Commission has the question of price fixing, although, at various times, all have tried.

There's no question, however, that IBP is a tough, hard-as-nails competitive organization unmellowed by success. In the early Seventies, IBP's co-founder and Chairman Currier J. Holman did not hesitate to deal with organized

crime when the survival of the company was at stake, and in the end the courts found him and his company guilty of conspiring to bribe union and supermarket officials. But all that's presumably in the past. IBP's current president and chief executive, Robert L. Peterson, 48, a bluff, hefty man who started out with the company as a cattle buyer 20 years ago, maintains that anybody ever associated with organized crime has long since departed the company, but even he does not really apologize. The charges, Peterson says, "grew out of Iowa Beef's decision to do what it had to do to get boxed beef into the New York market."

What Currier Holman (and his original partner, Andrew D. Anderson) achieved in the development of Iowa Beef Processors was so original in its conception, so daring in its implementation and so single-minded in its realization as to rank with Alfred Sloan's reorganization of General Motors in the Twenties or the evolution of IBM's long-term marketing strategy in the Fifties.

Holman's strategy was simplicity itself. As Iowa Beef executives have always explained, "We are only out to be the lowest-cost producer in the industry." That is all, and that, truly, is everything.

Intelligently, IBP uses that low-cost position, not to maximize its short-term profits, but to generate the maximum possible growth. The results is an almost certain increase in market share. In its first decade or so, IBP's market share crept up from nothing in 1961, to 8% by 1973, and rose only to 8.9% by 1977. But in 1978 it rose to 11%, to 15% in 1979, to 15.8% in 1980, maybe 17% this year, with 20% or so in prospect by 1982. Add in the carcasses IBP buys from others but does not itself kill, and its share of the U.S. steer and heifer slaughter moves close to 25%.

"We just took little bitty fractions all the way along the line," Peterson says, "and capitalized on them to get bigger"—fractional savings in slaughtering costs, in trans-

portation costs, in by-product values. Nothing really new. Most of the things IBP did had been done before, only IBP did them better, and on a much larger scale.

Twenty years ago IBP started out with a $300,000 Small Business Administration loan and a better idea for running a meat-packing business. Until then, farmers had generally shipped their cattle to the big stockyards in such river cities as Kansas City, Omaha and Chicago, and sold them to the big meat-packers who had set up shop in the neighborhood. But cattle get nervous away from home, go off their feed and begin losing weight. The longer they're away from home, the more weight they lose. The shrink, as it's known in the trade, can range from 1 pound to 50. So the quicker you move an animal to slaugher, the more yield you'll have, the more weight.

IBP set about reducing the shrink, by building a spanking new slaughtering plant, not near a terminal stockyard but smack in the heart of the cattle country at Denison, Iowa. IBP's cattle buyers—the Iowa Boys Patrol, as its radio-equipped cars were called—began buying cattle directly from the local farmers, coordinating their purchases with the needs of the nearby plant. IBP paid the farmers roughly the same price they'd have received in Chicago or Kansas City, but saved them the transportation, yard costs and commissions. And IBP got better value for its money, because it could get its cattle to slaughter before the shrink got under way. "If you lose even a pound," Bob Peterson says, "not 10 pounds, but a pound—on today's market, that's $1 a head, and when we make only $5 or $6 a head out of the entire system, you've got to be careful."

The time was ripe for a change. Truck transport had emerged to provide the industry a transportation flexibility that railroads couldn't offer. The supermarket chains had come to dominate food retailing and began buying fresh meat in unprecedented quantities. And the business of fat-

tening cattle in pens—feedlots—had begun to develop, on a large scale.

The initial response of the old-line producers was, of course, to resist, and then to try frantically and generally unsuccessfully to catch up. Today the rest of the beef industry has followed IBP into the cattle country. The terminal stockyards for beef have been largely abandoned, and so have the packing plants that once surrounded them. "They saw what the wave of the future was," says Lewie Anderson, head of the UFCW packinghouse division, "but they never really moved on the scale that they should have."

Meanwhile, IBP's Currier Holman rethought the whole slaughtering process. Instead of marching the cattle up to the fifth floor of a 50-year-old packing house, where skilled cattle butchers reduced the steer to a carcass, IBP began building large, single-story plants in which cattle were stunned, lifted by one hoof onto a moving chain, killed, halved and quartered, all on a moving dis-assembly line. The processing was done not by skilled butchers, but by a succesion of relatively unskilled workers performing a number of elementary tasks—removing the hoofs or tail, slitting open the abdomen or halving a carcass, making a single cut with an electric saw.

The first plant Holman designed had a kill cost of $10 a head, *vs.* $15 to $20 for conventional plants. Slaughter on the assembly line was (and is) an incredibly labor-intensive business, but by breaking the work down into its simplest elements, IBP was able to replace the highly skilled and high-cost packing-house butcher with relatively low-cost assembly-line labor. So labor made part of the difference in cost. The rest came from the economies of scale offered by plants capable of killing 300,000 or 500,000 or a million cattle a year. IBP diligently pursued these scale economies ever after. The original Denison plant was designed to slaughter 500 cattle a day, but now slaughters

1,500. Dakota City started out at 1,600, now kills 3,500 and is headed for 4,000.

Some of the most notable economies came from making more efficient use of the drop—the by-products of the meat-packing process—tongues, livers, hearts for the export market, ingredients for sausage and pet food. Urban butchers shipped fat to tallowmakers for shortening bone to the glue factories. But IBP with its large-scale plant could collect these products for conversion into edible animal feeds, gather the glands for use in pharmaceuticals, prepare the hides for tanning, even collect the gallstones for aphrodisiacs. "Our drop can get as high as $50 a head," Peterson says, "and our kill costs are less than that." A lot less, in fact—less than $20 a head. Multiply the difference by 6 million cattle slaughtered a year!

The Denison plant was just the beginning. A few years later, IBP launched an even more daring and innovative undertaking. It began extending the assembly-line process beyond slaughter and into the processing of beef itself. The usual procedure involved shipping carcasses in halves or quarters to the wholesaler, food chain or retail butcher, who then broke the carcass down into the various primal and subprimal cuts—loins, ribs, rounds and chucks; top sirloin, strip and tenderloin. IBP was prepared to do that itself, to take out the unneeded fat and bone, as well to wrap the primal cuts in cryovac film, box them and ship them to market. Putting the beef in a vacuum-packed plastic bag not only added 21 days to the normal 3-to-7-day shelf life of the carcass, it also sharply reduced the shrink that refrigeration exposed the carcasses to, and it expanded the beef packers' marketing area.

In boxed beef, a concept pioneered by Safeway and Armour, IBP found it necessary to reorganize the market, and that took some doing. The only market big enough to absorb the output of the great new plant Holman built at Dakota City, Nebr. was metropolitan New York, which

consumes maybe a quarter of the nation's meat production. Though IBP's executives may have been barefoot boys from the cornfields of Iowa, they weren't born yesterday, and they could hardly have been unaware that getting boxed beef into the New York market was going to take some heavy payoffs in the right places. As one IBP executive admitted later, "It was a common practice that people paid off other people to do business in New York City."

For IBP's boxed beef to prevail, the supermarkets were going to have to scrap their traditional butchering methods and the unions were going to have to accept the fact that a lot of their member butchers would lose their jobs. The situation was especially touchy insofar as the union that controlled the New York market, the Amalgamated Meat Cutters—now the UFCW—was also the union that had just organized IBP's new Dakota City plant and gone out on strike. When that happened, the New York meatcutters had an excuse to lend their support and banned boxed beef from the New York market.

IBP was prepared to make a deal with New York mob associate Moe Steinman, a labor consultant who had influence both with the local meatcutters union and with the beef-buyers of from which the union has yet to extricate itself. "They [the union] took the position," says Swift's President John Copeland, "that, given time, they would get everybody up to our rates. Not only did they fail, they couldn't even organize a lot of these companies, and their membership started dwindling." Only in the last few years has the rest of the industry found a way out—closing plants down long enough to invalidate the master agreement and then reopening them with either a local contract or no contract at all.

Cattle get nervous away from home, go off their feed, begin losing weight. So the quicker you move an animal to slaughter the more yield you'll have, the more weight. "We just took little bitty fractions all the way along the line," IBP's President Bob Peterson says, "and capitalized on them to get bigger."

Today John Morrell & Co. pays $10.02 an hour at its Sioux Falls, S.D. beef plant, *vs.* $8.20 for IBP at Dakota City, and fringe benefits—vacation pay, pensions—can widen the gap even more. In closing two plants last year, Armour complained that, at $16 an hour, its average wage and fringe benefit costs were 40% to 60% higher than costs at companies like IBP and MBPXL. Ironically, the UFCW master agreements discouraged the old-line packers from moving into boxed beef and gave IBP an additional advantage. "When you're at a noncompetitive cost," Copeland says, "the more you do to the animal, the more noncompetitive you get."

The result was inevitable. Over the Seventies at least 350 meat-packing firms closed down. These days everybody's trying to get out of the business—closing down plants, merging, selling out, palming the business off on somebody else. In the past two or three years Needham has gone out of business, Spencer Foods has sold out to Land O' Lakes, and Illini Beef sold its beef plant to Dubuque Packing. Wilson has gone out of beef slaughter entirely, and so have Hormel and Cudahy. Armour and Morrell have only two or three beef plants remaining, and their conglomerate parents are throwing their meet-packing subsidiaries one by one to the wolves. Esmark sold most of its Swift holdings to the public last April (after absorbing $26 million in closing costs and a $66 million writedown); LTV plans to spin Wilson and its $92 million in debt and $11 million in 1980 losses off to its own stock-

holders; General Host is planning to sell its Cudahy fresh-meat business to a group of employees. Even Montfort of Colorado, one of the pioneers in reshaping the industry, lost $24 million in fiscal 1980 and is fighting to stay afloat.

Peterson insists that labor isn't the only problem. "It's not how much you pay per hour," he says, "it's how much it costs you per hour to get something done. The question is: How many picnics do you get deboned in an hour? You give me just 5% more yield, and I'll make you so much more money than the guy that saves 20% on labor, it'll scare you to death." And when you've got both yield and labor costs as IBP has? "Why, then we're really coming, aren't we?"

IBP did not use its hard-won cost advantage to maximize its profits. Instead, it began to use it to increase its control of both the market and its cattle supply. Because of its cost position, IBP's cattle buyers have been able to pay higher prices for the available cattle—as much as a quarter of a cent a pound, or $20 a head. This may not matter so much when cattle are in abundance, but when they are short, as they have been since the cattle cycle turned downward in the mid-Seventies, it puts IBP's higher-cost competitors in a bind. The problem becomes even more acute because the industry's big packing plants need a fairly high level of operation to cover their fixed costs. IBP has been able to pay to keep its plants operating full-tilt as the competition has not always been able to do.

At the same time, IBP has been able to strengthen its grip on the market by skillfully exploiting its cost advantage in the form of lower prices. In the mid-Seventies, when it was trying to move boxed beef into a reluctant market, IBP was advertising that it could process and deliver boxed beef to a retail store for $23 to $36 a head less than the retailer could buy and process a carcass for himself. And as IBP's boxed beef made its way in the

market, the gains came mainly at the expense of competitors that had previously sold carcass beef.

Which is why IBP is as immune to recession as it is to swings in the cattle cycle or changes in beef consumption. Its growth is founded not on any growth in the market, but on the decimation of its competitors, on forcing the big packers out of beef and the local breakers out of business.

Until recently IBP hadn't had much success in persuading the chains to abandon the carcass-breaking facilities they already had. You don't scrap a multimillion-dollar plant without plenty of reason. But in the last few years, as the costs of beef and transportation have gone up, the stakes have risen, and more and more chains have begun closing their breaking plants and turning to IBP and its competitors for boxed beef instead. Grand Union is pulling out, Stop & Shop has already done so. Safeway has shut down its central cutting plant in Richmond, Calif. Albertson's uses boxed beef almost exclusively. Among the big chains only Kroger and Winn-Dixie are still committed to carcasses.

But once those breaking facilities and the meatcutters that manned them are gone, the chains become locked into their boxed-beef suppliers. Packers who once sold carcass beef to the retail chains can't afford the capital investment involved in building breaking and boxing facilities themselves, so they've either gone out of business or begun selling their premium carcasses to other breakers and boxers. Thus, Dubuque Packing—one of the biggest U.S. slaughterers—has already become an important IBP supplier.

IBP continues to up the ante by building increasingly large-volume, capital-intensive plants. IBP has four such plants in operation—all with capacities of 500,000 head or more a year—at Dakota City, Emporia, Kans., Amarillo and Pasco, Wash.—and its currently completing a huge

$100 million, 1.2 million-head plant in Finney County, Kans., the largest boxed beef plant in the world. This plant represents IBP's long-planned, long-delayed assault on the Los Angeles market, the U.S.'s second-largest meat market—and the only major market in which IBP has not yet positioned itself. IBP took over the Northwest with the 1976 acquisition of beef plants in Washington and Idaho. But until now, southern California's meat requirements have been met by local packers in the Vernon Street area of Los Angeles, who have lived off cattle in California and nearby Arizona and who mainly produce carcass beef for breakers like Safeway. But once Finney gets into operation, IBP expects to be able to deliver beef at a cost competitive with local packing-houses—despite the transportation cost disadvantages.

After California, what? Peterson is coy on the subject, but he maintains IBP is still far from exploiting the full potential of beef, either in the economies it can wrest from its manufacturing process or in new areas of the beef business it can bull its way into—the eastern Cornbelt seems one possibility. "We see no end of growth opportunities," Peterson says. Nor is there likely to be one, so long as there are competitors for IBP to knock off.

The way things are going the only sure survivors among the the major national beef-packers promise to be those who have already set out to duplicate what IBP has been doing for years: Cargill's flourishing MBPXL affiliate, Swift Independent in its new stripped-down, independent avatar and Spencer Beef with the financial backing of the Land O' Lakes farm cooperative. For the others, the future remains pretty uncertain.

Meanwhile, IBP is preparing for what could be an even more radical venture, an assault upon the $16 billion pork business, once the Finney plant moves into the black, with plants that will bring the same efficiency to pork that IBP brought to beef. Through a company called Madison Foods,

IBP already does contract pork-slaughtering for Armour, but the old-line pork producers are terrified at what IBP could do if it really pushes into their market.

Pork is a different business from beef, however. It's less labor-intensive, and some fresh pork is already shipped boxed, with the hams, pork bellies and so on removed for further processing. So the processing economies shouldn't be so pronounced. And because of health problems, hogs can't be raised in the quantities necessary for slaughter on the scale IBP has attempted in beef, though IBP could conceivably build a massive, centrally located plant and base its supplies not on feedlots but on thousands of small farms in Iowa, Illinois and Minnesota. IBP is confident that it can do so, and in so doing, revolutionize the pork industry just as it revolutionized beef. In the circumstances, it would be a rash soothsayer who would predict IBP couldn't do it. "We'll come big," Peterson has been known to say, "with a couple of hundred-million-dollar plants." Outside of Madison and a plant Hormel is building in Austin, Minn., there are really no large, efficient pork plants in existence.

Again, IBP has no intention of moving in and developing a new market. As always, it plans to position itself on the ruins of the old. Most pork plants produce 60% processed meats—ham, bacon and so on—and 30% pork. IBP intends to reverse the proportions, sell some of its output to processors, but the bulk of its production to pork producers that currently slaughter and process their own fresh pork.

Peterson's hope is that IBP's cost advantages will be so overwhelming that it will be able to deliver pork to the packers more cheaply than they can do for themselves. In a sense, it's custom slaughter on a massive scale—the Madison operation writ large—only IBP would provide its own hogs and market its own output to packers, supermarkets and other wholesale pork consumers.

"The big danger [to competitors]," says Swift's John Copeland, "is that they will come in and negotiate lower labor costs." In short, a replay of the situation in beef. Peterson denies that labor cost is central to IBP's strategy. But he also says, "The old master-agreement concept really isn't going to work." The UFCW has no intention of abandoning the master agreement, however, and, having gained some experience in beef, thinks it'll be better prepared to fight back this time. "A reaffirmation of a national bargaining strategy is the union's only possible means for avoiding the disaster experience in beef," says Anderson. "There's some indication they may not want to fight us in pork. They're getting a little big to be waging war with everyone all the time."

With pork in its pocket, Peterson expects IBP to move into portion control—the marketing of prepackaged retail-style cuts of beef, steaks and roasts, probably flash-frozen or even partially precooked. MBPXL has already begun marketing such a product. But Peterson thinks portion control is at least eight years away and probably longer. In the circumstances, Peterson doesn't worry much about where IBP is going to find the means of maintaining the growth it has racked up over the past 20 years.

Given its strength, it was inevitable that eventually somebody would try to take over the company. A few years ago, Los Angeles investor David H. Murdock acquired a 19% interest in IBP through his privately owned Pacific Holding Corp., and in late 1978 he actually made an offer to acquire the rest of IBP's outstanding stock. That failed when soaring interest costs pushed Murdock's financing out of reach.

But if Murdock couldn't afford to buy in, he could eventually arrange to trade up, and that's what he did last month, working out a deal with his Los Angeles neighbor, Dr. Armand Hammer. If the stockholders of both companies approve, Hammer's Occidental Petroleum will ac-

quire Iowa Beef for a package of common and nonconvertible preferred. Present value: $77 a share, vs. a recent price of $57, and the $30 Murdock originally offered to pay for the company.

For Occidental, IBP offers a host of intriguing possibilities not the least of which is the push Hammer could give to IBP's ambitions in the international market. It dramatically widens the domestic base of an international company perilously dependent on income from places like Libya and Peru. Perhaps most obvious of all, it gives Occidental control of one of the U.S.' most dazzling growth companies at what in other industries might seem bargain prices.

For Iowa Beef, the advantages are far less clear. An Occidental merger provides protection from a less congenial predator and, of course, it builds in some more of IBP's unrealized stock market value.

If the merger with Oxy gets through, IBP will be what it always has been: an autonomous operation headquartered in Dakota City, Nebr.

Nearly everyone—Forbes included—scoffed when Armand Hammer went into the oil business less than a quarter of a century ago. Nobody's scoffing now. By the same token, you can't put this deal in the same questionable class as Exxon's move into office machines or Mobil's move into retailing. It's a good bet that the analysts who speak patronizingly about his purchase of Iowa Beef will be lauding a shrewd move into the not so distant future.

[Pl. Ex. 64]

MEAT INDUSTRY
THE NATIONAL MONTHLY FOR
MEAT & POULTRY PACKERS & PROCESSORS
SEPTEMBER 1983

EXCEL

IF ONE TAKES THE VIEW that complete automation in beef fabrication is the prize at the end of a long, expensive race, then Excel Corp. just lapped its competition by opening a stunning new high-tech fab plant at Dodge City, Kansas.

The plant is a marvel of automation: warehousing, sorting, labeling, palletizing, de-palletizing, inventorying, and material handling are automated to the point where only a handful of workers is needed to control the flow and storage of 25,000 boxes of beef per day. Adjunct operations like box forming, product sorting, box sealing, and label coding are also all completely automated. In some areas of the Dodge City plant there is an almost eerie sense: thousands of boxes of beef are on the move, shuttling back and forth, being labeled, sorted, and stacked, machines clicking and whirring in the background—yet nary a person is in sight.

Plus, Excel has installed at Dodge City a high volume ground beef system that is, in terms of development and automation, two years ahead of nearly every other ground beef system in the U.S.A. programmable controller (PC) makes most of the essential decisions in the system, and also controls the start-up and shut-down of several pieces of large equipment. Loading, blending, and fat/lean mixes are all controlled by the PC. Only three employees are needed to operate this impressive system.

This isn't to say that the Dodge City plant is a ghost town. On the contrary, busy employees along six separate boning and trimming lines quickly cut beef quarters into shape: several more employees operate seven huge vacuum packaging machines. In general, an excitement is in the air, a fast metabolism. One can feel the pace quicken just by stepping into the production room.

This probably has something to do with Excel's unstated emphasis on youth. Warren Mirtsching, beef fabrication manager of the facility, is a 1977 Texas A&M graduate—only 28 years old. His oldest line supervisor is only 36, and most of the plant's 700 employees are in their 20s.

The fab plant is an addition to the existing beef slaughterhouse Excel built in Dodge City back in 1980 (See *MI*, May 1980). Volume on the slaughter side is so great, in fact—4000 head per day—that even at full capacity the fab side can handle only 80 percent of the slaughter production (the remainder is trucked to Excel's Wichita, Kansas, fabrication facility). Full fab capacity is not expected to be reached until January 1, 1984; however, a second shift swung into action July 18 of this year. At present 1300 head per day are cut and boxed, with target capacity being 3600 head per 16-hour day. The two shifts will produce an ultimate 25,000 60-pound boxes of beef per day.

The fab side of the plant is larger than any other fabrication facility Excel has built to date—overall square footage, including the 60,000-box warehouse, is 220,000; the production area alone is 80,000 square feet. Since all of this space is attached to the huge existing slaughterhouse, the complete Excel installation at the edge of Dodge City is nothing short of immense. Driving by the place on State Highway 154 seems to take several minutes, and the impression at night, especially, is remarkable. Two huge illuminated letters—"XL"—are attached to the building; they beam like headlights across the dark Kansas plain.

GROUND BEEF: A PC DOES IT ALL

Excel took what might be called the "concentric circle" approach to automating the fab plant. That is, automation was designed into the peripheral areas—warehousing, palletizing, box forming, sorting, and labeling—first, with more automation planned later for the core functions—breaking, boning, trimming—as the technology becomes available.

However, in one core area—ground beef manufacture—Excel has already focused on innovation. The result is a system unlike any other in the country.

At first glance the system, designed and built by RMF Steel, looks like other ground beef operations—a stainless steel cluster of blenders, grinders, and screw augers. But dead center in the middle of the assemblage is the key to this sytem's uniqueness—a programmable controller (PC). Because of the PC and its capacity to make decisions and operate machinery, the labor required to produce over 300,000 pounds of ground beef per week has been cut down significantly.

The PC has four cycles of operation: raw material distribution and loading, blender filling, formlulation and blending, and blender discharge.

One operator standing at the PC platform begins the sequence. By pressing one button, he commands the PC to begin maneuvering fat material into position for blender loading; the press of another button begins a similar procedure for lean. The fat and lean trimmings, a natural byproduct of the production area's boning and trimming lines, are discharged from conveyors into combos of a storage loader. Load cells tell the PC when the combos and loader are full so it can automatically divert raw material to a diverter. The diverter, in turn, automatically feeds

the storage loader when the load cells signal the PC. All of this is a continuous operation.

The operator then begins the blending operation by first commanding the PC to fill the lean blender, then the fat blender. This is achieved by having the PC automatically start appropriate feed screws, loading augers, and pivot screws. The blenders are also jogged when being filled, and after a preprogrammed set weight has been loaded all the machinery is shut off in sequence. Once the lean has been loaded the operator begins the same operation for fat.

Blending is started by the operator, who enters via thumbwheels the desired fat and lean percentages. The PC then automatically computes the right amount of fat to blend with the lean, starts fat discharge, activates the twin CO_2 horns for snow chilling, shuts off fats discharge at the appropriate time, and blends the mixture for a preprogrammed period, signaling the operator when to take a quality test.

Following the test, the PC begins blender discharge by automatically opening the blender doors, activating discharge screw augers, activating another pivot screw, and forces discharge first in the mix mode, then in discharge mode. When the product is out, the PC shuts everything down again.

The discharge screw augers are then operated manually to control flow to a Vemag 3000 stuffer and Kartridg Pak chub machine. Excel packs all of their ground beef production in 10-pound chubs. Blending equipment and augers in the system are all RMF; grinders were built by Weiler.

YOU NAME IT, IT'S AUTOMATIC

Excel has almost completely automated its finished product handling functions from the point where vacuum packaged beef is placed in a box to where that box is loaded—

sometimes days later—on a truck. Everything in between those two points is essentially automatic and continuous. This is due largely to an IBM Series 1 computer, which Excel uses to tie several operations together for maximum efficiency.

Boxes themselves are formed on four big Pearson automatic tray formers, each of which can produce 200 or so boxes from a load of flats in a matter of minutes. A photo-eye tied to the production floor, downstairs from the box forming room, controls box flow.

Once boxes have been loaded by hand they travel along a conveyor through a wall opening and into the labeling/sorting/accumulating area. Order at this point, because of Excel's flow pattern in the box-loading area, is random. That is, boxes lining up along a conveyor waiting to be labeled may be in any sequence—a box of top butts may be followed by two boxes of chucks, then by a box of tenderloins.

In order to bring the right boxes together and at the same time track inventory and production output, Excel has put together a sophisticated, state-of-the-art materials handling system comprising several pieces of equipment. First, Accu-Sort and Markem units weigh each box, record the weights for the IBM, jet-print the weight and product information in both UPC and digital numbers on labels, and affix the labels onto each box. As each box passes through this station on the conveyor it is added to the IBM's memory of inventory. Next, four Pearson automatic top flap sealers and four end flap sealers close and seal each box. Finally, another Accu-Sort unit reads the UPC on each box's label and directs each box to a precise station in a vast three-tier, 27-lane accumulating rack system. This is accomplished by a system of automatic "pushers," which, when directed by the Accu-Sort just up the line, push boxes up onto one of the three tiers, where another guidance system directs the boxes into appropriate lanes.

The result of this whole operation is that the randomly sequenced boxes are automatically labeled, sealed, and sorted by type. Palletizing is simple, then: Accumulated boxes of a single type are automatically gathered on a one-inch thick new-type plywood pallet (manufactured by Willamette Industries of Albany, Ore.), squared up by more automatic machinery, then sent by conveyor to the adjacent chill warehouse.

The warehouse itself is quite a display of state-of-the-art automation. In fact, the whole house is kept dark because no human even needs to be in the place. Five silent robot cranes, controlled by microprocessor and tied into the central IBM, ply the halls of the warehouse, alternately storing or delivering pallets of product on command. The rack system in the 32°F warehouse is six stories high, tall enough for twelve pallet positions. In all, the warehouse can store some 60,00 boxes of meat. The racks and cranes were designed and built by Demag, Inc.

Storage and retrieval in the warehouse is, of course, tied to order placement, and this is where the real usefulness of the IBM is apparent. The computer is not simply an inventory manager. Instead, it gathers and stores data on virtually every aspect of Excel's complex materials handling procedure, finally and ultimately releasing product for shipment. At any given moment Excel can track the position of virtually every box of beef in the p[illegible]

Shipping preparation of the boxes involves retrieval from the warehouse by one of the robot cranes, then de-palletizing in a series of complicated Wyard machines. Excel depalletizes because reefer trailers are more efficiently loaded without pallets. After de-palletizing the boxes flow down conveyors to one of the six loading bays, and there several employees load reefers with the aid of Expando conveyors reaching into the trailers.

BONING & TRIMMING X 6

As mentioned, all of this high-tech automation is circled around the core functions—the boning and trimming of beef. The details of Excel's current method of breaking, boning, and trimming were worked out at the company's Friona, Texas, plant (see *MI*, August 1979), albeit on a much smaller scale. Still, efficiency experiments conducted at Friona proved to be applicable to Dodge City, and Excel basically follows the Friona layout at the new plant.

Carcasses enter the production room along a power rail from the adjacent slaughter side's huge cooler. Immediately the carcasses are weighed on a Fairbanks scale, which will hold a day's production in memory. Then the beef is cut by several standing workers into primals with Jarvis air saws and/or two Butcher Boy saws. Some knife work is also done at this point.

Once the beef is broken into quarters, the meat is hung on special scissors hooks prior to movement towards the boning and trimming lines. These hooks, which function more like clamps, were first tried at Friona, and Excel has found them to be safer for employees and also more firm in grip of the meat.

There are six boning and trimming lines in all, including one line for bone cleaning. The other five function by specific product type: chucks, rough meats, ribs, rounds, and loins. Each line features a three-tier Omeco-Boss conveyor—the top level for bone take-away, the middle for trimmed product, and the bottom for trimmings. The lines are about 75 feet long each, and strung along each side are about 20 employees, most working with hand knives, some with Bettcher Whizard air knives. Bones on the top conveyor of each line fall, at the end of the line, onto a perpendicular conveyor which automatically transport them over to the bone cleaning line. This line's production of material for edible rendering flows down the bottom level

of the conveyor, then is hauled up an incline conveyor into Excel's Crepac edible rendering system.

Thus, the flow in the forepart of the production area is basic and efficient: carcasses are broken along a rail system that loops north to south: the boning and trimming lines run perpendicular east to west. The best use is made of available space and the meat never travels very far enroute to another operation.

Between the end of the boning and trimming lines and the central packaging area is a short space given over to packager-feeding conveyors and an area for netting and packing chucks. Following is an impressive row of seven Cryovac 8318 vacuum packaging machines, the biggest Cryovac manufactures. This kind of packaging is truly state-of-the-art: Excel bought the first seven 8318's Cryovac built. The "18" in the model number indicates that the units will handle an 18-inch width bag, the widest—yet most flexible—in the industry. This row of packaging equipment is a remarkable sight: The hoses reaching from the core of each machine to the vacuum chambers arch like crab legs, and when all the machines are operating it looks like a conclave of rather large arachnids. Interestingly, some of the smallest—yet most dexterous—employees in the plant, Vietnamese women, operate these huge machines, one woman to a machine.

Following packaging the meat flows onto a triple-tier horseshoe Protec roller conveyor for boxing. Product rolls down the middle level, empty boxes coming from the box forming room are on the top level, and filled boxes are transported to the labeling/sorting area on the bottom level. Several employees work on the inside of the horseshoe, and Excel has spent considerable time training these people to recognize the different trimmed products so box loading is efficient and organized. The training seems to have paid off, since these employees routinely differentiate

over 100 different products that all look the same to the man on the street.

In fact, Excel has emphasized good training throughout the plant. Still, if an injury does occur, the company has two nurses standing by at the plant for first aid. There is also a "light duty" program to keep ailing employees productive and employed.

[Pl. Ex. 65]

Occidental Petroleum Corporation
1982 Annual Report

"Twenty-five years of record growth and progress have led us to this moment—the threshold of a new era."

[Pl. Ex. 65a]

Industry Segments
(continued) (in millions)

	Total	Oil and Gas: Exploration and Production	Oil and Gas: Refining, Marketing, and Transportation(6)	Coal	Agribusiness	Chemical Products	Other
Year ended December 31, 1982							
Revenues	$ 18,708.0	$ 3,940.8	$ 6,684.8	$ 841.6	$ 5,961.4	$ 1,260.2	$ 19.2
Corporate, interest, and other	(181.1)						
Total revenues	$ 18,526.9						
Pretax operating profit	$ 1,992.8	$ 1,742.3	$ 86.0	$ 107.4	$ 97.8	$ 15.1	$ (55.8)
Income taxes	(1,444.5)	(1,386.3)	(1.5)	(4.0)	(40.6)	(12.8)	.7
Segment earnings	$ 548.3	$ 356.0	$ 84.5	$ 103.4	$ 57.2	$ 2.3	$ (55.1)
Interest expense, net	(327.4)(1)						
Corporate and other	(65.3)(2)						
Net income	$ 155.6						
Capital expenditures	$ 930.6(3)	$ 588.5	$ 35.0	$ 60.5	$ 110.5	$ 110.6	$ 9.1
Depreciation, depletion, and amortization	$ 614.7(4)	$ 383.0	$ 8.3	$ 43.9	$ 70.0	$ 66.8	$ 12.7
At December 31, 1982							
Total segment assets	$ 13,673.9	$ 7,700.5	$ 1,847.1	$ 1,079.0	$ 1,733.0	$ 1,208.5	$ 105.8
Corporate assets	2,098.6(5)						
Total assets	$ 15,772.5						

(1) Net of capitalized interest included in capital expenditures. See footnote 3 below.
(2) Research and development costs were $66 million, $73 million, and $64 million in 1982, 1981, and 1980, respectively.
(3) Total includes capital expenditures for corporate assets of $16.4 million, $6.4 million, and $13.9 million in 1982, 1981, and 1980, respectively and includes capitalized interest of $54 million, $35 million, and $53 million in 1982, 1981, and 1980, respectively.
(4) Total includes depreciation on corporate assets of $30.0 million, $20.6 million, and $19.6 million in 1982, 1981, and 1980, respectively.
(5) Includes notes receivable of $355 million from the sale of a gas transmission company and a federal tax refund receivable of $308 million.
(6) Includes the following amounts relating to the refining, marketing, and transportation operations of Cities Service, which are being considered for sale.
(Note 2): revenues, $574 million; pretax operating profit and after-tax segment earnings, $16.7 million each; capital expenditures, $23 million; depreciation, depletion, and amortization, $1.3 million; and assets, $1,584 million.

Occidental is primarily an energy resources company, with oil and gas and coal operations, and an agribusiness company. In addition, Occidental has investments in selected chemical operations. The exploration and production segment of its oil and gas operations explores for, develops, and produces crude oil, natural gas, natural gas liquids, synthetic crude oil from tar sands and oil shale, and geothermal steam. The refining, marketing, and transportation segment manufactures and distributes gasoline, distillates, and other petroleum products, purchases and sells crude oil and natural gas from and to third parties, and transports crude oil and petroleum products. The coal segment mines, processes, and sells bituminous coal. The agribusiness segment processes and markets beef, pork, and their byproducts and agricultural chemicals, fertilizers, and animal feed supplements. The chemical products segment develops, produces, and sells a variety of industrial chemical products, plastic materials, products and resins, and metal-finishing chemicals, equipment, and processes.

Earnings of business segments and geographic areas exclude interest income, interest expense, corporate expenses and the equity in net earnings and losses of affiliated companies.

Foreign income taxes are allocated to segments and geographic areas on the basis of operating results. United States income taxes are allocated on the basis of agreements between Occidental and its operating subsidiaries.

Identifiable assets are those assets used in the operations of the segment. Corporate assets consist of cash, short-term investments, investments in affiliated companies, certain corporate receivables, and other assets.

Intersegment sales and transfers between geographic areas are made at prices approximating current market values and are not significant.

[Pl. Ex. 66]

The New Cattle Barons

Cargill and Land O'Lakes are bullish on beef

By Terry Brown

Most of us weren't looking when a giant industry underwent a revolution. It started just over 20 years ago. Its Bunker Hill was at Denison, Iowa, but we chewed our steaks and weren't any the wiser for it. Corporate bodies littered the landscape. Unions wailed and continue—though with new humility—to wail at their growing helplessness in the face of the revolutionaries.

When the smoke cleared a handful of victors emerged and were quickly rewarded as entrepreneurial victors often are these days: they were bought out. Multinationals took charge. Meat packing—that's our giant industry—stands today under the spotlight of the growing corporate interest in world food marketing, and two Minnesota companies are leading the trend.

Three firms lead the modern packing industry. One is Iowa Beef Processors Inc., the original revolutionary, which headquarters at Dakota City, Neb.[sic] Iowa Beef, or IBP, was purchased last summer by Occidental Petroleum of Los Angeles. It is twice as large as its nearest competitor, MBPXL Inc., of Wichita, Kan.[sic] MBPXL was bought in 1979 by Cargill Inc. of Minneapolis, a move that has excited the interest of the antitrust crowd in Washington. Number three, Spencer Foods of Spencer, Iowa, was absorbed in 1977 by Land O'Lakes. The Twin Cities-based

agricultural co-op saw the concentrating success of Iowa Beef and MBPXL and began worrying about the impact on its farmer members. The three represent distinct approaches to corporate survival in the 1980s. The collision of their philosophies creates a tidy allegory for the economic debate in the agricultural Midwest, in the nation, indeed worldwide.

Our story begins in 1960, when an Iowa meat packer named Andy Anderson recruited a notorious Iowa cattleman, Currier Holman of Sioux City, to start a new packing house. The two brought together a group of investors and, with the help of a $300,000 Small Business Administration loan, built a slaughterhouse at Denison. With Anderson's engineering vision and Holman's ruthless administrative drive, IBP combined slaughtering and marketing efficiencies with a fervor unknown in the industry. IBP reached the *Fortune 500* list in less than three years.

Within seven years the company had become the largest beef slaughterer in North America. With annual sales now in the $5-billion range, IBP dwarfs the better-known names in meat packing—Swift, Hormel, Armour, Wilson, Morrell, Cudahy—some of which don't even bother with beef anymore. The old companies were saddled with stiff union contracts that Iowa Beef undercut, using cheaper laborers doing less-skilled work. IBP's successes in fighting labor—despite a series of bitter, somethings violent, strikes—are as responsible for its ultimate success as any of the slaughtering efficiencies it introduced.

What IBP did was painfully simple. Few of its ideas were original; IBP just used them better and with more vigor than anyone else. Since cattle lost valuable weight in transport to stockyards and slaughterhouses, IBP built its plants (today it operates 11 in five states) out in the country, and bought its cattle direct from the producers, saving them the transportation and feed costs incurred in moving their animals to the yards. The rapid decline of

the major stockyards, South St. Paul's among them, can be traced as much to Iowa Beef as to any other factor.

IBP built single-story packing plants, in contrast to the inefficient multi-story plants of the old-line packers, and used a sort of disassembly line to process the cattle. Instead of using high-priced butchers to cut the animals apart, IBP hung the cattle from overhead chains, a sort of tramway, and used unskilled workers to make a single cut on each carcass as it moved past. Production increased dramatically; old plants began closing down.

In marketing, Iowa Beef took an idea originated by Armour and Monfort, a Colorado packer, and spent millions applying it in the usual Currier Holman fashion—in as big a way as possible. The idea was boxed beef, in which the carcasses are broken down into generic, or subprimal, cuts at the slaughterhouse, vacuum-sealed in cryovac, and shipped in boxes to supermarkets, hotels, and restaurants.

Boxed beef, which now accounts for nearly two-thirds of the beef trade in the U.S., meant that supermarkets didn't need high-priced butchers to break the carcasses. It meant that upwards of 200 pounds of useless bone and fat was removed from the carcass before shipping, cutting transportation costs. It also meant that the product could be packed more efficiently into a truck or railroad car, further reducing cost per pound.

Finally, IBP was one of the first companies to build computerized warehouses, reducing labor costs still further. The combination of efficiences was more than the rest of the industry could withstand.

Iowa Beef's rise to dominance wasn't without controversy. In addition to bitter strikes, there were government charges that the company actively tried to drive its competitors out of business, and some of IBP's attempts to acquire other packers were blocked. Later, cofounder Hol-

man was convicted of conspiracy to commit bribery in New York as a result of commission agreements he made to get his boxed beef into the New York City market, the most carnivorous region on earth, consumer of about a quarter of the beef slaughtered in this country. Although the judge who convicted him released Holman without punishment, saying he'd been extorted by organized criminals who controlled the meat trade in New York, IBP still labors under a somewhat unsavory reputation, though it's well on the mend. But the dues paid by Iowa Beef through its toughness and incredible drive spread coattails on which Spencer and MBPXL could ride with relative comfort.

Both firms thrive today using the same methods that made Iowa Beef successful. Although all five of MBPXL's plants and two of Spencer's three are unionized, none pays the fat master contract of the United Food and Commercial Workers Union, the document that forces old-line packers to pay up to several dollars per hour more than the newcomers.

Spencer has been around the longest. A cattleman named Bud Pearson, his brother Bob, and an uncle bought a plant in Spencer, Iowa, from a group of businessmen in 1952. They turned the plant into a one-species operation—cattle, no hogs—and started killing with cheap labor, a portent of the Holman days. The firm grew slowly but steadily until 1977, when Land O'Lakes bought Spencer. With two plants, the second at Skyler, Neb., it was the number-seven beef killer in the land.

During the early days at Spencer, the Pearsons struck up a relationship with one of the more successful cattle buyers in Sioux City, one Currier Holman, who came to like what he saw in Spencer Foods as he procured cattle for the company out of the Sioux City stockyards. Eventually, in the late 1950s, Holman asked to be taken on as a partner but was rebuffed. Later, Bud Pearson lured two

IBP executives away from Holman, to Holman's great irritation. Robert Peterson, now IBP's chief executive, came to Spencer as a sort of aspiring Holman—tough, single-minded—and left when he and the other "stolen" officer, longtime IBP finance man Maurice McGill, disagreed with the Pearsons on the merits of various ancillary ventures in sausage making, hide processing, and the like. Peterson and McGill thought such ventures drained the company.

Today, back at his professional home, Peterson runs IBP much as Holman did, using to maximum advantage the well-chosen curse, the apt and carefully timed tirade, the six-day work week and absolute devotion. Pearson, meanwhile, says he doesn't bother thinking about how his life might have changed had he taken Holman on when he had the chance.

MBPXL is also closely tied to Iowa Beef. Its founder, Gene Fry, was Iowa Beef co-founder Andy Anderson's brother-in-law. His first plant at Rockport, Mo., went up in 1966. IBP tried to buy MBPXL (when it was called simply Missouri Beef Packers) in 1972, but complaints from other competitors that such an acquisition would spell monopoly in the Iowa-Missouri-Kansas region, plus the bad press from Holman's bribery indictment in New York, scotched the deal.

Today, these three companies slaughter more than 35 percent of the cattle processed in the United States, in a $65-billion industry that trails only automobiles among manufacturing and processing industries. The three are responsible for well over half of the boxed beef, which, according to one estimate, will account for 80 percent of all beef processed in this country by mid-decade. How Spencer and MBPXL will proceed in the next few years, now that they're firmly rooted in rich corporate turf, will depend on their rather divergent corporate philosophies, two ways of making more than a few bucks.

With well over a quarter-million members, Land O'Lakes is the second-largest agricultural cooperative in the country. It manufactures and markets feedstuffs, fertilizer and other agricultural commodities to the advantage of its members. In an era when the farmer sees his financial health ebb by the day, his balance sheet dominated by banks holding ever-more-expensive loans, and his markets dominated by huge agribusiness firms with economies of scale that leave the little folk flushed with envy, a co-operative can be a welcome refuge. So when word reached Land O'Lakes headquarters that many cattle-raising members of the co-op in Iowa, Minnesota and Nebraska were having trouble selling their cattle, the company looked into the matter.

The problem, as the members saw it, was that Spencer Foods had just closed its Spencer slaughterhouse because of a labor dispute—the company couldn't keep up with Iowa Beef and was in danger of going under. Many cattle feeders in the area feared that they would have trouble getting a fair price for their animals with Spencer closed.

Ronald Dudley, Land O'Lakes' group vice president in charge of the Spencer Foods Division, picks up the story from there: "Spencer was having some profit problems, in addition to its union dispute at the Spencer plant. Their network of divisions was inefficient, the hides, the processed meats, and so on. They felt they could sell out to somebody, and that that would be best for their stockholders.

"Spencer Foods seemed to be a good opportunity for us. But that wasn't the first time we thought about the meat business. Our desire goes back to 1970, at the time of the Felco [another cooperative] merger, when we agreed that eventually we'd be getting into meat. By '75 we could see that the industry had started concentrating. There was a dramatic change. Between '70 and '75, IBP growth was impressive. The smaller operations were closing their doors

and going out of business. The industry was becoming more capital-intensive and more concentrated."

So after 18 months of studying the industry to determine if and how it should get involved, Land O'Lakes saw Spencer's trouble as the chance to pick up two prime slaughterhouses for the bargain price of $12 million, in October of 1977.

"We saw," says Dudley, "That the capacity was there in the industry. There was no shortage of brick and mortar. This was important because it costs a lot to build from scratch, and Spencer was the ideal prospect. We didn't really look at anyone else because no one else was available in our area.

"We left it to the Spencer people to sell off the other assets, which weren't profitable. When we bought Spencer, we saw that we'd have capital problems expanding. American Beef [another major packer forced to close during the '70s] had a plant that became available at Oakland, Iowa, and we bought it nine months or so after we bought Spencer. We paid $1.1 million.

"It was in our game plan to add boxed beef at Oakland. We renovated Spencer for slaughtering only. We've been officially running cattle through at Oakland since June of last year, but we've been up to snuff only since November, after the remodeling. And there's boxed beef at Skyler [the Nebraska plant]. So now we're number-three in slaughtering and number-three in boxed beef."

Pace-setter IBP now slaughters about 120,000 cattle a week. MBPXL slaughters about half that; Spencer, about a third.

One problem Land O'Lakes didn't want to inherit from Spencer was a troublesome lawsuit filed by a group of cattlemen who formed the Meat Price Investigators Assn. The group charged that four top packers—the top three plus Flavorland Inc., of Kansas, which today has faded

from the scene—and 24 of the largest supermarket chains had conspired to fix meat prices to their advantage. The suit has been mired in court since it was filed in 1976, and Spencer agreed to settle, for $400,000, as a condition of the sale to Land O'Lakes, although in so doing it admitted no wrongdoing and indeed denies it vigorously. But the result is that the settlement, plus another from beleaguered Flavorland, has given the group a war chest to continue pursuing the suit. Iowa Beef has sought unsuccessfully to have the settlement voided.

When Land O'Lakes heard that its cattle-raising members needed help, the company took a look at beef.

The suit is mocked as a mere nuisance by all the major packers. One economist for a Congressional committee, who's studied the meat industry for many years, says that he sees no evidence of any collusion among the packers, and he's been actively looking for wrongdoing at the behest of Rep. Neal Smith, and Iowa Democrat long at loggerheads with the giant meat packers. But the suit is a symptom of a general feeling among many small producers and some lawmakers that the economic problems plaguing many cattle producers are a direct result of concentration in the hands of major meat packers. But Ron Dudley, the farmer's man, still comes down on the side of the big packers. Like almost everyone else in the meat industry, Dudley speaks of Currier Holman and MBPXL in tones of unabashed mercantile admiration.

"Neal Smith can chase the boogie man of bigness all he wants, but you can see the advantage of bigness. It's a matter of scale economics. With the margins as thin as they are all up and down the line in meat packing [Iowa Beef's 1.5 percent profit margin is by far the industry's largest; most packers hover at or below 1 percent, if they're in the black at all], it's just good business to grow.

But for the farmer it's just good business for us to be involved."

Part of that involvement means teaching members to raise the kind of cattle the packers want to buy. Americans have been shying away from fat, highly marbled beef in recent years, both because of price and because of frequent admonitions from doctors about the evils of cholesterol. So the packers want leaner cattle, which aren't kept on the feedlots as long and thus cost less to raise and bring a lower price. That's fine for the packers, but the farmer, worried about low prices, is often tempted to keep his cattle on the lot in anticipation of higher prices, so they fatten in spite of the marketplace. Frequently, the farmer ends up getting a lousy price for an overfat, expensive animal.

So Land O'Lakes has a program to teach its members to use the proper feed regimens and schedules to raise the right grade of beef and to select the breeds most likely to produce it. Other advice is also offered on competing with the bigger, more efficient feedlot owners who feed by computer and move their animals in and out on their own schedule, regardless of the state of the market. Some Land O'Lakes members are large feeders, but most aren't blessed with the advantage of great size.

"For the little producers," Dudley reiterates, "it's just good business for us to be involved."

At Cargill Inc., good business means size, and the company has clearly demonstrated its knack for achieving it. Cargill is the largest grain broker on earth, America's largest private corporation, and a vertically integrated agricultural conglomerate straight out of the textbook. In beef, the vertical integration is what piqued the interest of the Packers and Stockyards Administration (P&SA), a branch of the U.S. Department of Agriculture.

Cargill owns the world's second-largest beef slaughterer (MBPXL) and the largest cattle-feeding operation in the

world (Caprock Industries, with four huge feedlots in the Texas Panhandle and western Kansas). Cargill has also begun to market beef at retail (which hasn't been done by a major packer since 1920), and of course controls many millions of tons of the grain that fattens the cattle in the first place. No one argues about whether Cargill is vertically integrated. The only point at issue is whether its vertical integration is bad or good.

When Cargill bought MBPXL in 1979, P&SA started an investigation into allegations that the company was custom feeding cattle in violation of federal regulations. Custom feeding is the practice of fattening cattle on contract for someone else, operating a feedlot like a cattle hotel at which the owner of the animals pays a fee for their room and board, and then, when they're fat enough, sells them for the best price available. P&SA charged that Cargill was custom feeding and then compelling the producers to sell their cattle to MBPXL slaughterhouses at a price disadvantageous to the producers in violation of the law.

Cargill denies it; Jim Smith of P&SA in Washington won't comment in advance of the investigation's completion. Still, the investigation continues and has broadened to include the cattle marketing situation in the whole of the High Plains region—including Kansas, Texas, and Colorado.

"We're not focusing on Cargill anymore," reports Smith. "We started this not only because of Cargill buying MBPXL but also in part because of some of the concerns of Congressman Neal Smith up on the Hill. We wanted to look at the structure and what the effects might be, meaning the rise of the big packers and the demise of the smaller ones and what might be causing that."

Results of the P&SA inquiry are due sometime during the first half of this year; budget tightening has slowed the final stages somewhat. But Cargill argues that the

smaller packers are going out of business because they can't compete in a free and open marketplace. Ward Watson, chairman of the board of both Caprock Industries and MBPXL, who works out of Cargill's corporate headquarters in Minnetonka, explains:

"The main concern of the investigation, as we understand it, though they haven't been in touch with us directly on it, is that they felt custom feeding could hurt the competitive position of the customer in dealing for the best price. Well, we couldn't stay in business for very long if we didn't give a fair price for the cattle we buy. This is a freely open, competitive business, in the most classic sense. You make your bid and you're free to make your own success or failure. Integration doesn't pay in itself. Each factor must stand on its own. You must let it sell the best it can in the marketplace. Locked-in integration may work, for example, with U.S. Steel [owning all stages of production and supplying to itself] but not with agricultural commodities."

So when a Caprock steer can bring a better price at an IBP plant on a given day than MBPXL is paying, the steer goes to IBP, Watson says. Between 15 and 18 percent of Caprock's animals go to MBPXL plants; about 10 percent of MBPXL's slaughter comes from Caprock. The cattle business is too complicated, though, to be reduced to simple terms of integrated ownership, which does not necessarily mean concentration, says Watson.

"The meat business involves a prolonged biological cycle that isn't easily summarized," he adds. "It's two-and-a-half years from a producer's decision to save a heifer back from slaughter to produce a calf, through gestation, early cow-calf feeding, to a feedlot, and finally to the slaughterhouse. That's a long, long time, and markets can change a lot in two-and-a-half years."

The advantage is clearly with the big producers who can weather changes in the marketplace. MBPXL had

trouble getting enough cattle to fill its slaughter shifts late last year but it still had the volume to stay financially healthy. Smaller slaughterhouses had a tough time. December is typically a slow month for the cattle business, but the situation was exacerbated by a poor economy and dangerously low cattle prices. Many producers kept their cattle at home, leaving feeders without animals for the slaughterhouses.

To foster the growth that characterizes Cargill divisions, MBPXL is moving with enthusiasm into retail meat sales. If you think about it, you'll realize that you've probably never bought beef at retail under a label other than that of the store where you bought it. There's a simple reason for that: for all the major packers (Swift won exemption several years ago) of the old days, selling fresh beef at retail is against the law.

In 1920, in a famous consent decree, the U.S. Department of Justice prohibited the five major packers of the time from owning stockyards, selling at retail, and engaging in other practices that characterized a truly vicious vertical integration that involved literal price fixing and collusion to apportion the nation's meat markets. The big packers were caught red-handed meeting in hotel rooms, unabashedly lowering their prices to producers artificially and raising their wholesale and retail prices the same way. The bad taste left by that era of meat packing history in the government's mouth may help explain current skepticism about the motives of the major packers. In any event, the resulting pattern until very recently has been for none of the big packers to sell at retail.

Cargill, of course, benefits from the cryovac vacuum-sealed preservation of beef nowadays, which has extended the shelf life of fresh meat from about one week refrigerated to three. MBPXL's "Country Cuts" have been available for some time in some parts of the Sunbelt—an area convenient to the company's Wichita processing

plant—and, beginning this past January, Cargill started a retail experiment in Memphis and Oklahoma City, using television and other advertising to determine whether the retail business should be expanded nationwide.

According to MBPXL's Herb Meischen, sales manager at the Wichita headquarters, the Country Cuts are "minisubprimal" cuts of beef—a strip loin, top round, rib eye, and the like—weighing from four-and-a-half to eight pounds, vacuum-packed and ready for the customer to trim to size as the butcher would from a boxed-beef cut in a supermarket.

"They have a retail trim to them," says Meischen, "meaning approximately a half-inch fat cover, as you're used to seeing in a grocery store. You can cut it as you'd like, just like a loaf of bread."

The advantages are better price and, according to Watson, more consistent tenderness, due to consistent aging. The test ads feature the tenderness factor, which Watson says was mentioned most often by test families as the advantage of the product. The cuts are more carefully selected, Watson says, then typical boxed-beef cuts and are given special, sturdier vacuum packaging. It's a move Iowa Beef has only contemplated so far. Diversification at IBP is getting close examination, and the company figures retail marketing will probably have to wait until the second half of the '80s. In the meantime, Cargill hopes to press its advantage.

That advantage is the company's stupendous size, which can feed continued growth. IBP, bought for more than $800 million by Occidental Petroleum (more than three times the book value of the old IBP stock) now has Occidental's multibillion-dollar resources to back its planned move into pork slaughtering. IBP's Madison, Neb., plant now custom slaughters hogs for Armour, making it a major force in the pork business on that basis alone. Plans include huge new pork plants in eastern Iowa or western Illinois.

But Cargill's corporate bulk is more directly related to the meat business, so P&SA took more notice of its takeover of MBPXL than it did of the IBP buyout by Occidental, which is involved in oil, chemicals, and fertilizers, but not otherwise directly in food. Cargill's capital expansion promises to be orderly and diverse. Watson says that the company has "ambitions" in pork but no firm plans. (The pork industry quivers in nervous anticipation of the giants overwhelming the pork business as they did beef.) He says that plans for expansion in beef are already underway, but he declines to discuss them specifically.

MBPXL now exports about 5 percent of its beef production, mostly frozen carcasses to Japan and some variety meats—hearts, tongues, and the like—to Europe, and hopes to bolster that total. IBP, thanks to Occidental chairman Armand Hammer's close connections in the Soviet Union, has begun to explore the possibility of boxed-beef sales to that country and even dreams of slaughter-houses there. Watson is dubious about sales to eastern Europe because American beef is more expensive than the lower-quality, grass-fed Australian and Argentine varieties.

The revolution is over, a new establishment has taken root, and the consumer is probably paying less for beef because of it.

Meanwhile, in contrast to those heady global ambitions, Land O'Lakes wonders if it will be growing at all.

"Our ambitions are not like IBP's or MBPXL's," says Land O'Lakes' Dudley. "Our purpose is simply to serve our members, and we don't necessarily want to grow just for growth's sake. It may be that we're as large as we're going to get. If the need arises, we may grow bigger. Let me give you an example. Let's say the Monfort plant at Grand Island, Neb., goes out of business, and the ranchers

out there say, 'Our market's hurting; can you help us out?' That's in our region and we might look at it.

"Now pork is a different business. We may get involved there, but only when our membership says they need us to. I guess I'd have a 90-percent comfort saying we'll get into pork sometime."

And so the top three go their dominant, profitable ways with no one looming on the horizon to overtake them. Swift, in a new incarnation as Swift Independent Packing Co., would like to consider itself a contender, but it hasn't proven itself since it was spun off by Esmark Inc., the holding company that bought Swift in its original, IBP-riddled form.

Neal Smith has left his chairman's seat on the House Small Business Committee, where he did his sniping at the meat industry, for a slot on the Appropriations Committee, so there is doubt about the future of government action in beef. Although Smith continues to cite a 1979 study showing that the top four meat packers account for two-thirds of the slaughter in the 23 states that account for almost all of the nation's meat production (in Smith's view a dangerous concentration), his voice is given less heed in Ronald Reagan's Washington.

Producers agree that the big packers still pay the best prices for cattle; that's their advantage. Smith's cry is that it won't last. About all that is sure in the meat industry is that the revolution is over, a new establishment has taken root, and the consumer (though no study has been done to substantiate this with any certainty) probably is paying less for beef because of it. Unions have grudgingly accepted the grim reality that the fat master contract was driving the old packers out of business, and, as in other troubled manufacturing industries, many locals are accepting pay cuts to preserve jobs.

Would it be fair to try to legislate even lower prices by some regulation of the industry, limiting market share

or integration, as Rep. Smith suggests? Cargill, IBP, and Land O'Lakes say regulation would spread inefficiency throughout the industry and raise prices. Is corporate size such a bad thing? Is it "bad" or just "too bad" that smaller meat packers are losing their battle with the IBPs and the MBPXLs?

The answers to those questions are yet to come.

Terry Brown is a Twin Cities free-lance writer.

The disassembly line

Lean into a modern cattle slaughterhouse and you'll see humankind at its most modern and its most primitive. From an up-sloping gutter running in gallon after gallon of warm blood, you move quickly among gleaming, computerized machinery and whitecoated technicians. Furry, sadly lowing cattle are quickly reduced to the familiar, faceless carcasses that generally are all one sees in pictures of slaughterhouses.

Cargill's MBPXL slaughterhouse and boxed beef processing plant at Plainview, Texas, in the middle of the Panhandle wind plain, the cattle and sorghum country, is as modern a meat packing facility as any on earth. At no stage is the process brutal; it's thoroughly humane for the animals. The workers, in spite of their razorsharp equipment and frenetic work pace, are copiously supervised, inspected, and safe.

It's all routine; any shock at the spectacle passes in a moment or two. The cattle are stunned one at a time with a device, a sort of tubular gun, that drives a pin the size of your index finger into their brains, using an explosive cap. A chain beneath the raised stunning platform loops around a hind hoof, and the steer (only a small percentage are heifers) slips down a water-lubricated slide and is lifted by the chain to a track on the ceiling. At this point the

animal is stunned, in no pain, but is often alive and twiching.

Through a doorway, the roughly 1,200-pound animal is transported upside-down to the most gruesome step in the process, in which a worker uses a remarkably sharp knife to slice the carotid artery. The blood drains quickly down a gutter in the narrow, sloping floor. The smell of hot blood, vaguely fecal but far more acrid and overpowering, is perhaps the element of slaughter most difficult for the uninitiated to get used to. It hits you first well outside the livestock entrance to the abattoir, but is quickly gone once you enter the processing floor.

The blood, incidentally, doesn't go to waste. It's dried and, being high in protein, is mixed with cattle feed, which fattens the next round of cattle for slaughter. It's a small irony, all part of the business.

On the processing floor, the carcasses float by at the rate of 330 per hour, more than five a minute, no more and no less. If there aren't enough cattle to fill a shift, the shift is shortened, but the chain speed doesn't vary. An incredible mixture of human and machine laborers cut and strip the animals, performing a single task over and over again in a fantastic tangle of chains and troughs and conveyors, a disassembly process that did for the meat industry what assembly lines did for the auto industry.

Little goes to waste. Hides are salted, folded, bound with twine, and sold to processors. Hooves go to glue factories. Up to seven pounds of meat is stripped from the heads, most of which goes for hamburger. All sorts of miscellaneous parts find their way into processed meats—sausage, hamburger, and the like. All the stock is shunted to and fro in the plant and its refrigerated warehouse by computer, a thousand electric eyes shifting coded boxes along conveyors of rollers and finally into waiting trucks for shipment.

The sleek, modern, one-story slaughterhouse is a far cry from the standard turn-of-the-century model that dominated into the 1960s and remains here and there to this day. These were multi-storied affairs, in which cattle were killed and processed individually, at stations manned by crews that took apart an entire animal.

An elevator took the cattle up to the top floor of the building, where they were stunned (until relatively recently with a sledge), disembowelled, and then transported down by the elevators for further processing. The various unusable viscera and other waste—called "offal"—was poured down a chute lubricated with water, like the modern chutes descending from the stunning platforms, into a place one floor below called the "gut shanty." Workers there had the worst job in the plants. Currier Holman, the man who took Iowa Beef Processors to the top of the meat industry, worked in a Swift and Co. gut shanty as his first meat job during the Depression. During his first night on the job he slipped with a large vat of offal, spilling it over himself, head to toe. The modern plants of today are, at least in part, a legacy to that miserable first night on the job for Currier Holman.

In the modern plants the carcasses are cooled overnight before being further broken down for shipment in boxes. You can't work hot beef. Finally, the meat is shipped out in semi-trailer trucks. In no more than 21 days from the pop of the stunner, the beef is on your table. —T.B.

[Photographs Omitted in Printing.]

[Pl. Ex. 75, Def. Ex. 7X]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

DEPOSITION OF: PAUL F. STREALER

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by Philip A. Fishman, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, held at 2 Paragon Drive, Montvale, New Jersey on Thursday, September 22, 1983, commencing at 9:30 in the forenoon.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 4]

PAUL F. STREALER, 2 Paragon Drive,

Montvale, New Jersey, having been duly

sworn according to law testifies as follows:

DIRECT EXAMINATION BY MR. HARTLEY:

Q Mr. Strealer, are you appearing here pursuant to a subpoena served upon you?

A I am.

Q When was that served?

A Today is Friday. Wednesday—Tuesday or Wednesday, whichever day. It was this week.

Q Where are you employed, sir?

A A & P Tea Company.

Q In what capacity?

A Vice President, National Meat Procurement.

Q What are your responsibilities in that position?

A I am responsible for the procurement of beef, lamb, veal, pork, poultry and related items.

Q How long have you been Vice President of National Procurement?

A Three years.

Q Can you briefly summarize your prior employment history with A & P?

A I started with A & P in September of 1952. I was employed as a buyer trainee and have advanced over the years to my present position.

[Pl. Ex. 75, Def. Ex. 7X p. 5]

Q Have you been involved in meat procurement the entire time you have been with A & P?

A Yes, I have.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 6]

Q Still focusing on this time in the 50's that you have been describing, how was the beef that ultimately found its way to A & P fabricated?

A At that time it was principally in quarters. You cannot ship sides of beef. In essence, what you did, you bought two hinds and two fores to make up a cattle.

Q By whom was the breaking or fabricating done?

A At that time, it was done by our company, by A & P.

Q Was it done centrally or at individual stores?

[Pl. Ex. 75, Def. Ex. 7X p. 7]

A It was done at individual warehouses into primal cuts and then further reduced at store level.

Q Did there come a time after the 1950's when this method of distribution changed significantly?

A Yes, in the late 60's we started to experiment with a boxed beef that became available.

Q What is—what do you mean by the phrase "boxed beef"?

A Beef that is reduced to primal or sub-primals, vacuumized in most cases and placed in a carton.

Q By whom is the beef reduced into primals and sub-primals as you have described?

A Today?

Q In the boxed beef process.

A By packers.

* * * *

Q Do you know who fabricates the beef that was purchased by A & P in boxed form as you described in the 1960's, late 60's? Was that done by a slaughterer, independent fabricator?

[Pl. Ex. 75, Def. Ex. 7X p. 8]

A It was done by slaughterers and it was done by some fabricators.

* * * *

Q The point I am driving at is how your purchases of boxed beef related to your volume of purchases of carcasses at that time.

A Oh, well, of course you start everything slowly. I can't give you a percentage. It was very, very small in the late 60's.

Q Did there come a time when it became a larger percentage of proportion?

[Pl. Ex. 75, Def. Ex. 7X p. 9]

A Today it's 100 percent.

Q When did it first become 100 percent?

A Probably in '73, '72-'73, 1972, 1973. Okay?

* * * *

A We had Salem, so I am going to correct the record, if you will.

In that period of time, we were buying carcass beef, some carcass beef that went into Salem and came out as a box. When I referred to the 100 percent, I am referring to store usage, if you will.

Q How long did your Salem facility operate?

A We discontinued that beef operation two years ago. It would be two years this December, the beef fabricating part of it.

Q Why was that discontinued?

A There was a merchandising problem which created an imbalance of movement of the components that are derived from a side of beef.

Q Can you explain that for me? I am not sure I follow you.

[Pl. Ex. 75, Def. Ex. 7X p. 10]

A I cannot give you specific number of cuts that comes out of a cattle. I am sorry.

But as an example, we would merchandise vast quantities of goose necks, which is one small component out of the side of beef. You break a side of beef for a goose neck and you would be left with the remaining parts which had to be moved within our company at a discounted price.

Therefore, it became economically not feasible to continue the operation.

Q Now, you indicated that the Salem facility was closed two or three years ago?

A Two years ago.

Q Two years ago, excuse me.

A In December, 1981, the beef part of it.

Q Yes.

Has A & P considered reopening that facility?

A No.

Q Can you tell me what would be involved if you decided to reopen it, what would be required?

A Well, the plant currently has no equipment in it. Number one, it would require a complete refurbishing of the facility.

Q Is there a labor force available or employed by A & P to engage in that fabrication?

A I am sure it would be available. They are not [Pl. Ex. 75, Def. Ex. 7X p. 11] currently employed, obviously.

Q The employees that used to work in that facility have been transferred or discharged?

A They all have been severed and/or transferred.

Q What percentage of your beef purchases at A & P, Mr. Strealer, are presently received in boxed form?

A With the small exception of some that goes into New Orleans, for all practical purposes, I used 100 percent before. It probably would be 99 percent that goes into the stores as boxed.

Q Can you tell me in a generic sense who your suppliers are? By that I mean are your suppliers what I might call integrated slaughterers and fabricators, slaughterers that also have their own fabrication units?

A Principally from that source.

Q Can you give me an example of that kind of firm?

A IBP, MBP, Spencer, Monfort, Swift.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 16]

Q Can you tell me why A & P shifted to boxed beef?

A We perceived certain economies that were available. We felt that we could receive a product in a box, at store level, and it would require less labor to process it because we were dealing with a specific cut as opposed to the whole quarter or primal. We felt, from a storage area, both at warehouse and store, you could store boxes. You could get more cube, obviously, in both areas. It was easier to handle.

Q Let me just interrupt briefly. You say you can get more "cube." What do you mean by that?

A Well, in a given space, you could put more product. Does that answer your question?

Q I think it does, yes.

A You literally shipped more usable meat in a truck from point of origin to point of destination. So, therefore, there were some freight savings.

[Pl. Ex. 75, Def. Ex. 7X p. 17]

Q Were there any reasons relating to your merchandising or marketing program that influenced your decision?

A I believe I answered that before in that merchandising switched from an overall sale of beef cuts to specific items at specific times.

Q Are you familiar with provisions in labor contracts, for example, that might limit the ability of an A & P store and might have in the past limited the ability of an A & P store to purchase boxed beef?

* * * *

A I don't believe that that's speculation. In Chicago we did have a specific restriction.

* * * *

Q Can you tell me what that was?

A The labor unions in Chicago specifically did not permit the handling of boxed beef.

Q Are those restrictions still in effect?

A No.

Q When did they cease to be in effect?

A I cannot actually answer that.

[Pl. Ex. 75, Def. Ex. 7X p. 18]

Q Would it have been within the last five years?

A Yes.

Q Three years?

A Within the last five years. Last three years? I don't know.

Q How did your stores in Chicago receive their beef during that period of time when these restrictions were in effect?

A Swinging. In other words, suspended and/or layed down on pallets.

Q Was any beef purchased from independent fabricators at that time?

A Yes.

Q Do I understand correctly that your testimony is that now it is possible for your Chicago stores to purchase boxed beef?

A Yes.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 20]

Q Let's turn, Mr. Strealer, if we may, to beef purchases specifically by A & P. Can you tell me what kind of beef A & P purchases?

A Today it's principally choice, cutability free [sic] or better.

Q What is the source of that kind of beef? I am talking in terms of cows, bulls, fed beef, steers and heifers.

A It's fed beef.

Q Do you purchase any cow and bull beef?

A Bull beef, no, to my knowledge. I say that because number one, cow and bull beef is principally used for fur-

ther processing. Within our organization, that is the only purpose.

Cow meat might be bought in a frozen, boneless block form. It is used for grinding purposes as an addition to our grinding operation at store level.

[Pl. Ex. 75, Def. Ex. 7X p. 21]

Q Why is it that A & P doesn't purchase cow and bull beef for other purposes besides grinding?

A It's not generally a palatable product. It's comparable to a fed beef or a fed cut. Cow steak is just not a fed beef steak.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 22]

Q I just meant, do you know whether other retail store chains buy cow and bull beef for things other than grinding?

A I can't honestly answer that question knowledgeably.

Q Do you have a general understanding of any kind?

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 23]

A Major competitors buy fed beef. I say that because major competitors are on choice programs and bulls do not grade choice.

Q What is the source of your understanding to that effect?

A Advertising, cross shopping. By cross shopping, I mean I visit competitor stores as often as I visit my own.

Q Let's talk about your suppliers, if we may. Can you tell me how many beef suppliers you have, in general terms?

A In the area of 30 to 40.

Q Do you have some suppliers you consider to be major suppliers or primary or principal suppliers?

A Yes.

Q How would you make that cut or make that definition?

[Pl. Ex. 75, Def. Ex. 7X p. 24]

A Anyone exceeding one and a half, two percent of totals.

Q How many suppliers would fall in that range?

A The most recent data, approximately eight.

Q Can you give me an idea as to the share of your total beef purchases, those eight would have?

A Again of the recent date, approximately 75%.

* * * *

Q Can you identify them for me? You need not put them in any particular order.

A Not in order would be Excel, Swift—excuse me, scratch Excel—Spencer, Swift, Monfort and IBP.

Q We have identified a number of categories, or perhaps a better word is mentioned, of distribution of beef. Do you consider integrated slaughter and fabricated firms to be potential suppliers of A & P?

A Independent, did you say?

Q No. Integrated.

A Yes, they are potential suppliers.

Q The example I think you gave of an integrated supplier was IBP, Monfort or Spencer?

A Right.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 25]

Q Are there any integrated slaughter and fabrication firms from which you do not purchase beef?

A I am certain there are.

Q Those would be the potential suppliers, I suppose, as opposed to the actual suppliers. Isn't that right?

A Yes, you can say that.

Q A second procedure or method of distribution we described was the slaughterer and independent fabricator that sells boxed beef. Is that correct?

A That is slaughter to independent processing.

Q Then on to the retail store?

A Yes.

Q Do you consider that line of distribution to be a source of potential supplier for your stores?

A Yes, in a very limited way.

Q Why is it limited?

[Pl. Ex. 75, Def. Ex. 7X p. 26]

A There are not many around anymore.

Q A third method of distribution we described was the slaughter to retail owned fabricators. Do you consider that method of distribution to be a source of potential supplier for A & P?

A No.

Q Why is that?

A I haven't bought from competitors. They have never offered me any product to buy.

Q The final method of distribution was, I believe, from slaughter houses, essentially direct to the retail store without the intervention of a fabricator or processor. Do you consider that to be a potential source of supply for A & P?

A Not as A & P's stores are presently structured without the facilities to adequately handle and protect the product in swinging form.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 29]

Q Mr. Strealer, let's assume for the purpose of my next question that we are talking about a period of time when the boneless chuck was selling to your company for a price in the range, the bottom range you just described, let's say 88 or 90 cents.

Do you have an opinion as to the effect on the volume you would purchase of a five percent increase not only in boneless chucks, but in—I'm sorry—five percent increase in not only boneless chucks but in all of the primal and sub-primal cuts you are purchasing?

* * * *

A Five percent in my judgment would not cause too much of an upheaval or a deferral away from the product.

Q How about a ten percent increase?

A Well, as you increase your cost relative to other competing items, it could start to have an effect, yes, definitely.

Q Would you expect that cost increase in terms of percentages now to begin to have a significant effect [Pl. Ex. 75, Def. Ex. 7X p. 30]on the volume of your purchases?

* * * *

Q The hypothesis was that all the prices of primals and sub-primals were increased about ten percent. Remember, we are talking about that lower range.

A You would have some movement if the total beef structure raised itself up ten percent. You would have some movement away.

Q Would you expect similar movement if you had an increase limited to five percent?

MS. FISHER: Over what period, Counsel?

MR. HARTLEY: Same period he has been describing.

A We were talking—I would have to assume a specific time. If there was an immediate five percent increase overall for all beef items, I say there would be little [Pl. Ex. 75, Def. Ex. 7X p. 31]impact. However, if during the same time poultry were to drop, it would have more of an impact. If—well, leave it at that.

* * * *

Q Are you aware, Mr. Strealer, that Excel Corporation has announced that it has signed an agreement to acquire Spencer beef division of Land-O-Lakes?

A I don't know about signing an agreement. I know there is a move that Excel and Spencer are planning a merger.

Q Do you have an opinion as to the effect of that acquisition upon your procurement of beef?

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 32]

A Well, that's a consolidation within the industry. Take two independent sources of supply who are competing currently with each other. When they merge into one, you eliminate that segment of competition. So, that concern I have. Anyone would have that concern, I believe.

* * * *

Q Why does that concern you?

A The more sources of supply that you have, the healthier—let me see—it is to our advantage to have a varied number, as far as sources of supply are concerned, independent sources of supply.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 33]

[CROSS EXAMINATION BY MS. FISHER]

Q I would like to ask you on the beef procurement side, what factors do you generally take into account in your beef procurement efforts?

A The reputation of a supply source with regard to quality and service and price.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 35]

Q Do you buy any fresh beef today at all?

A What do you mean by "fresh"? Do you mean suspended beef?

Q Either carcass or that which is not boxed in a box.

A No. Except as I stated before, in New Orleans, on occasion, we would buy or have bought unboxed beef.

Q That's a beef that's fabricated by a local operation but not boxed. Is that correct?

A Not necessarily local. In most cases, it is not a fabricated cut. It's usually a hind quarter.

Q Why do you buy hind quarters for your New Orleans operation?

A They happen to like them on occasion.

[Pl. Ex. 75, Def. Ex. 7X p. 36]

Q Do you know why they like them?

A No, I do not.

Q Does A & P, to your knowledge, buy any frozen beef products?

A Boneless processing beef.

Q Other than the boneless processing beef, does A & P buy any frozen beef products?

A No.

Q Has A & P bought frozen beef products other than the boneless processing cuts in the past?

A No.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 41]

Q When you described in your earlier testimony that there were four firms which represented 50 percent or more of A & P's purchases, does that shift over a time; has it?

A Over time, over what span of time?

Q Over the past year, have there been firms that were not among these four—among those four?

A Yes, there might. The bottom end might fall out periodically, yes.

Q So the percentage that you buy from any given supplier changes over time. Is that correct?

A May I clarify one thing before I answer that question and go back just one step?

Q Sure.

A If we use the 50 percent factor, I would have to [Pl. Ex. 75, Def. Ex. 7X p. 42] say that four would always remain in that top 50 percent.

Q That's Spencer, Swift, Monfort and IBP?

A That's correct.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 46]

Q I am asking you to assume that their price did not go up. In other words, they were offering you their product at a lower price than the packer boxers were offering their product.

A Taking into consideration the service and quality factors, yes.

Q So, in other words, you don't base your boxed beef purchasing decisions on whether a supplier is packer or a breaker.

A Not if the breaker is breaking our quality and cutability type cattle.

Q So what you are saying is that your purchasing decisions are based on price, quality and service. Is that correct?

A The price, the quality and the service factors being equal among all, if we make that assumption, then it relies on price; that is correct.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 47]

Q Does A & P purchase any non-fed cattle cuts other than cows and bulls?

A We don't buy any bulls to my knowledge, please.

Q Excuse me.

A The only cow meat that we specifically buy is frozen boneless in block form.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 55]

Q What is your definition for a minimally efficient facility?

A That which were you to try to employ, wherever possible, a machine to pace the work as opposed to a man pacing the work; automation.

Q Would you describe the Salem, Ohio facility that you shut down in December of '81 a minimally efficient facility?

A Subminimal.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 57]

Q In its internal fabricating facility in Salem, Ohio, did A & P fabricate cuts and ground beef from cows?

A No.

Q Did it fabricate ground beef from cows?

A No.

Q Did it fabricate—it fabricated no cow meat?

A No, it did not.

Q The facility in Salem, Ohio fabricated fed cattle of all grades?

A Not all grades.

Q What grades and yields did A & P fabricate?

A From a quality grade, it was prime, choice, some [Pl. Ex. 75, Def. Ex. 7X p. 58] ungraded product that was choice equivalent. From a yield standpoint, one's, two's, three's and four's.

Q Now, when you speak in terms of an ungraded product of choice equivalent, what do you mean?

A Within the industry, normally anything that would not be a cutability three. In other words, that which would be a cutability four could be of choice quality, but a four cutability is not rolled choice.

Q When you refer to "ungraded product," you are referring to no roll?

A I am referring to a choice equivalent unrolled or no roll product.

Q You make a distinction between unrolled and no roll?

A No one has clearly defined no roll. My definition is no roll principally tells you what a product is not, not what it is.

Q How is that?

A Depending on where you buy it from one must be selective from where one buys a no roll product. You would not buy no roll product out of a cow plant.

Q Why is that?

A Because you could end up with cows. I said, "could," I didn't say "would." I said "could."

Q I understand.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 59]

Q Now, earlier we were talking about the Salem, Ohio fabricating plant which A & P opened and used and you talked about a time period in which there was a merchandising switch to particular cuts. Do you recall that testimony?

A Yes.

Q Would you describe that merchandising switch, please.

A There was a time where the retailer would feature whole round, as an example, and would break it [Pl. Ex. 75, Def. Ex. 7X p. 60] at store level into the necessary components or retail cuts; i.e., the top sirloin, which is the sirloin tip or knuckle, the bottom round and the top round.

When the industry made boxed beef available in subprimal form whereby you could buy just the top round or just the bottom round or just the knuckle, they took that course which meant that they could specifically feature one of those cuts and not concern themselves with the other two necessarily. It was the easier way.

Q And when did that merchandising switch take place?

A I would say it was a revolutionary thing that started in the 70's, the early '70's and just evolved.

Q If you could no longer buy beef products at competitive prices from your current suppliers, it would be feasible, would it not, for A & P to re-enter the beef fabricating process?

A Competitive to what?

Q Competitive to your competitors. In other words, if you were not able to buy beef products at prices which permitted you to resell those beef products at competitive prices, you could then turn to an internal source of supply. Is that not correct?

A I don't think that question can be simply answered in this respect: A competitor that breaks internally, [Pl. Ex. 75, Def. Ex. 7X p. 61] versus a competitor that doesn't break internally?

Q Let me ask you: Are there a set of circumstances which you believe that A & P could return to internally fabricating beef products?

A I can't—I do not see that happening.

* * * *

Q Are there not some circumstances, set of circumstances, under which A & P would decide to fabricate beef again?

A I cannot envision them at this point in time.

* * * *

[Pl. Ex. 75, Def. Ex. 7X p. 62]

Q You said earlier in your testimony that you were—that you had some concern that there would be one fewer major supplier of yours after a merger between Spencer and Excel. Do you recall that testimony?

A Yes.

Q Is that testimony based on your position with Spencer in particular or was it based instead on a theoretical concern about the reduction of one competitor for your purchases? Do you understand that question?

A More or less, I understand it. It's now a matter of answering. I guess I would have a concern for what is today an independent action by each of those sources of supply, which if merged, would then be a single action.

Q So if any of the eight firms that you listed were to merge with any other one of the eight, that would be of the same concern to you?

A I would have the same concern.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

Depostion of JAMES F. ROBERTS taken before Joyce A. Loos, verbatim reporter for GENERAL REPORTING SERVICE, INC., and a Notary Public duly commissioned, qualified and acting under a general notarial commission within and for the State of Nebraska, on September 27, 1983, at 780 NBC Center, Lincoln, Nebraska, commencing at or about 1 p.m., and adjourned from day to day until completed, to be used in evidence on behalf of the plaintiff.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 4]

DIRECT EXAMINATION

By Mr. Hartley

Q Mr. Roberts, would you state your name and address, both residence and business, for the record, please

A Okay.

[Pl. Ex. 76, Def. Ex. 7Y p. 5]

James F. Roberts. My home address is 8120 Myrtle Street, Lincoln. My main corporate address is Box 794, Lexington, Nebraska.

Q Are you appearing here today pursuant to subpoena, Mr. Roberts?

A Yes, I am.

Q What business are you involved with, sir?

A Well, my basic business is I am a cattle-feeder. I'm involved in nearly all segments of cattle production and all phases, but cattle business is my main business, in the feedlot capacity.

Q Do you do business under any particular name?

A Roberts Cattle Company.

Q And where is that located?

A Lexington, Nebraska.

Q You refer to doing business under or in all aspects of the cattle-feeding business. Can you tell me what you meant by that?

A Well, our main enterprise, of course, is the commercial feedlot at Lexington, where we feed out about 30,000 cattle a year.

I also have a cow herd of several hundred cows located in the State of Colorado.

I also have a commodity business located here in Lincoln, and I do a private consulting business with [Pl. Ex. 76, Def. Ex. 7Y p. 6] financial institutions and individual people specifically related to the cattle industry, but a little broader than that in other segments of agriculture, also.

Q Have you been involved in any other aspect of the cattle-feeding or beef-packing business?

A Well, yes.

I was part of a group in 1959 that planned and built a packinghouse at Lexington, Nebraska. Once it was built, I was the day-to-day manager of that plant for several months.

Then following that, I was the president of that corporation for several years, and was involved until about

1973 in that business, as well as my cattle-feeding enterprise.

Q Does that plant have a name?

A Yes.

Cornland Dressed Beef Company.

Well, they have changed the name. It's Cornland Beef Industry, I believe is the current name of that plant. It's currently Cornland Beef Industries, I believe, but I have had no involvement with them in a business relationship, other than selling them cattle, for the last ten years.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 8]

Q You referred to your cattle-feeding business and I think you said you had a feedlot in Lexington.

A Yes, I do.

Q Is that the only feedlot you have?

A Yes.

That's the only one that I own.

Q You also said, I believe, that you typically feed out about 30,000 head per year?

A Yes.

Q How many cattle would you have in the feedlot at any one time?

A Well, anywhere between 9,000 and 10,000 head, normally.

Q So there's some turnover in there in a given year.

A Yes.

We get about three turns a year, we hope. That's our goal, at least.

Q What kind of cattle do you feed?

A Steers and heifers, predominantly yearling cattle, steers weighing from 750 to 850 as they come into the feedlot, and heifers weighing from normally 650 to 725.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 10]

Q What would be your principal cost factors in feeding cattle?

A Well, the corn is the principle cost factor, along with other feed ingredients of alfalfa, hay, soybean meal, et cetera, but it's feed cost, number one. The other major cost is the cost of the feeder cattle as we buy them delivered to our feedyard.

Q Now you are located in Lexington, Nebraska, isn't that right?

A That's right.

Q Why is your feedlot located in Lexington?

A Well, most simply because that's where I was born and brought up, I guess, but I chose to expand our operations in that area because we have very, very fine feed supplies, and that was the principal reason.

Q Is it important to have good feed supplies?

A It's extremely important.

Q Why is that?

A Well, it's the equation that when you feed cattle [Pl. Ex. 76, Def. Ex. 7Y p. 11] in general, it will take somewhere between six and eight pounds of feed to produce a pound of gain, and it is much cheaper to move the

finished product—in this case, beef or cattle—to the marketplace than it is to move grain to the cattle from a distant location. So the transportation costs of the feed overpower the transportation costs of the cattle.

Q What factors would you consider if you were thinking about either establishing a new feedlot or relocationg, for whatever reason, your current one? What geographic factors would make a difference?

A Well, there would be about three major factors.

One we've mentioned of feed supplies, adequate feed supplies, particularly of grain close by.

The second consideration would be the weather in the area that we wish to feed. We would not move into a more negative weather area than the one we are now located, and we would probably move a little bit south.

The third thing is the availability of slaughter plant outlets to purchase our finished product.

I made a study of that, because I had intended to build another feedlot in southwestern Kansas. Having reviewed that over the last three or four years, if I were to build another feedlot today, it probably would be very near the one that I presently have.

[Pl. Ex. 76, Def. Ex. 7Y p. 12]

Q Why does it made a difference if there are packinghouses or packinghouse outlets available?

A Well, the closer they are and the more of them that there are, we feel the better the salability of our fat cattle. Obviously, the closer they are, the less freight there is from our feedlot to the slaughter facility and the closer we have those, the better off it is for us financially.

Q Who are your customers? I'm not now speaking about individual companies, but rather generically. What kind of business do you sell fat cattle to?

A Well, we sell them, of course, to packers that slaughter predominantly fat cattle, almost exclusively. They vary in size from small, independent plants to very large multinational corporations. So there's a full gamut of the type of packer that we sell to.

I guess that's it.

Q Let's return to your cull cows and bulls that you occasionally will sell each year.

Do you sell cows and bulls to the same trade or same group of businesses that you would sell steers and heifers to?

A No, no.

Not in general.

Q How would that differ?

[Pl. Ex. 76, Def. Ex. 7Y p. 13]

A Well, the cows would be bought, in general, by plants which specifically are cow and bull slaughterers, and those plants in general do not kill very many fat cattle, and the converse is true. Most larger and even smaller slaughterhouses generally specialize in fat slaughter cattle, as opposed to cows or bulls.

Now that would not be exclusive, but that generally would be pretty true.

Q Let's go back now to the fed-cattle business. You were talking I think somewhat generally about your customers. Can you think back to —Well, let's start with the present.

Can you tell me now, by name, who your principal or regular customers would be?

A Do you mean the buyers of our fat cattle?

Q That's right.

A Yes.

Our main buyer in the past few months has been Cornland Dressed Beef Company.

Q Where are they located?

A In Lexington, just a few miles from my operation.

We then sell cattle to a number of other packers. Pepper Pack, which is based out of Denver but has other plants, buys cattle from us. Of the bigger packers, we sell some cattle to Monfort, to IBP, to Excel. We do [Pl. Ex. 76, Def. Ex. 7Y p. 14] sell cattle to a plant called National, down at Liberal, Kansas, on occasion. We also sell to a company called Litvak Pack in Denver, on occasion.

That would encompass—If I haven't forgotten any, that would encompass the main sales. There may be an occasional load to someone else, but that's the majority of the cattle.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 18]

Q I think you indicated earlier that there were perhaps eight or nine firms that visited your feedlot regularly in the first of 1982, and what I'm asking now is: Other than the three you've mentioned—American Stores, Dugdale, and Sunflower Pack—which were the other ones?

A By name?

Q Yes.

A I guess I thought we had already gone over that.

The other ones, of course, were IBP, Excel—at that time, known as Missouri Beef, as we knew them—Monfort, Minden Beef, Cornland, Dugdale. I don't know if that's that many.

Q Was Pepper?

[Pl. Ex. 76, Def. Ex. 7Y p. 19]

A No.

Pepper was not a buyer in our yards in early '82. They have come to the scene in the past few months.

Q If I can summarize your testimony then, Mr. Roberts, so the record will be clear—please correct me if I'm wrong—I gather that in the beginning of 1982, your primary—or the buyers that visited your feedlots once a week would have included Minden, IBP, Monfort, Excel, Cornland, American Stores, Dugdale, and Sunflower Pack. Is that pretty close?

A Yes, I think it is.

Q And then in the interim, between the first of '82 and the present, American Stores, Dugdale, and Sunflower Pack have no longer come to your feedlots, and you have added Pepper?

A That's true.

Q So you have lost three and gained one, as sort of the net result?

A Basically, that's true.

Q Mr. Roberts, you indicated, I believe, earlier also that transportation cost was a factor that you would consider when determining where to locate a feedlot, isn't that right?

A Yes, that's true.

Q What role does transportation cost play in the [Pl. Ex. 76, Def. Ex. 7Y p. 20] sale of fed cattle?

A Well, we normally sell out cattle FOB our feedlot and the packer pays the transportation from our yard to his packing plant.

The closer the packer is to our feedlot, in general, the more competitive he can be, because if he is 250 miles away, compared to, say, 25 miles, he has obviously another 50¢ a hundred in round numbers more transportation costs than does the closer packer. So that when you look at it in final analysis, while the packer pays those costs, he gets compensated or return by lowering his bids to make up for the cost that he has to incur. Without saying it's an exact relationship, in general that's the way the trade works. The further they are away, the less they can bid, in general, because of their transportation costs.

There are, you know, isolated exceptions from time to time, depending on the marketplace, but I think that's a basically true statement.

Q Can you give me some idea of how far most of your cattle are shipped? By "most", let's start with, say, 75 percent.

A Currently?

Q Well, let's talk both currently and look back to the first of '82, as well.

[Pl. Ex. 76, Def. Ex. 7Y p. 21]

A Well, currently I would say that over half of our cattle are shipped a very short distance, because Cornland Dressed Beef has probably bought them. I haven't looked at this exactly, but it probably is buying close to half of our cattle now.

The next step out beyond them, with Sunflower closed down—And, by the way, any cattle that we're selling to Excel, the old Dugdale plant, would also fit in that percentage.

Then when we go beyond that, we have Pepper Pack, which is in Denver, even though they, I guess, have acquired plants in Sterling, which is much closer; the plants

in National; the Monfort plant, which is about 80 miles away; the IBP plants, which could be any of three or four, and could be as far away as Dakota City, Nebraska, which would be 250 miles, at least, and Westpoint, which would be a little over 200, 220, the Emporia plant, which we don't get to very often, the plant down at Garden City, which would be again about 225 miles. So once we get beyond the nucleus of the nearby plants, then we've got to go for the balance of that approximately 200 or more miles.

Q Do you sell any cattle to packers located in, for instance, Indiana?

A No.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 22]

Q Do you ever sell any cattle in Kentucky or Tennessee?

A No.

Q Mississ ppi?

A No.

It might be easier to elicit the states that we have ever sold cattle in, if that would be of any assistance.

Q Sure.

A Nebraska, Colorado, and Kansas, and the only exception to that I can remember is that one time several years ago we did sell one pen of cattle to a packer in Illinois. There are no other exceptions of which I can remember.

Q Do you have any idea why you haven't sold cattle to buyers in more distant states—let's say on the East Coast, for example, or in the Southeast?

A Well, there are very few packers on the East Coast, and there are very few packers for our type of production of fat cattle in the Southeast. They are obviously a great distance away by transportation, be it [Pl. Ex. 76, Def. Ex. 7Y p. 23] rail or truck.

When I was managing the packinghouse, of course, we sold our beef product to the East Coast from Boston to Florida, and points in between.

Q Fat cattle are different?

A Yes, quite a bit different.

* * * *

Q. It's fair to say you're personally involved with the sale of your cattle?

A Yes; very, very involved

Q Can you describe for me the factors that you think influence the price you receive for your cattle?

A Supply and demand are the simplest factors, I guess.

Q Tell me what has an impact on supply.

[Pl. Ex. 76, Def. Ex. 7Y p. 24]

A The number of cattle available for slaughter over the country as a whole, and specifically within the immediate trade area of central Nebraska and northern Kansas for me, personally. That supply changes, as you spread that circle out. Eastern Nebraska certainly is involved in that supply situation, and that's about as far as it goes, at least for the most part—somewhat in eastern Colorado, and you could probably say it gets into Texas. But for the most part, those are more fringe areas. relevant to our particular market.

Q What has an impact on demand?

A The demand is the relationship or the reaction to the availability of supplies and the number of people that are competing for the product that's available.

Q Number of packers in the marketplace?

A Yes.

That would have a place in it.

Q And the number of cattle that those packers are trying to buy?

A That's right.

It depends on how bad they need blood on the floor.

Q By that, you mean how many cattle they're trying to slaughter?

A Well, you know, packinghouses don't work very [Pl. Ex.76, Def. Ex. 7Y p. 25] well if you don't kill cattle, and so it depends on how badly they need, how close-bought they are, what their sales potentials are in the marketplace, you know, for the boxed product, the broken product, or the hanging carcass.

Q Does the quality of the cattle you sell have an impact on the price you receive?

A Oh, yes, it certainly does.

Q In what way?

A Well, how well will they grade? How well will they yield? Those are the two most dominant forces. Do they fit the weight pattern that the particular plant wants to buy for their box, if that's the case, or for their trade, whatever it may be? In other words, are they the proper size, the proper finish, and the proper yield?

There are other factors, you know, little things like—well, they're not little really, but making sure that the cattle out of each feedlot are not bruised, that the liver

condemnations and abscesses are not higher than normal, things like that.

But those are the three that are the main concerns—the yield, the grade, and are they the proper size to fit the orders.

Q How about transportation cost, is that a factor?

[Pl. Ex. 76, Def. Ex. 7Y p. 26]

A Yes, that's a factor.

Q We've been talking about that, but maybe you can begin to tell me how it relates to the price you receive.

A Well, if we had a pen of cattle, and assuming they were all the same to every packer—they all viewed them the same, and they never do; there's always the matter of judgment—and Packer A was very close to me, and Packer B was 250 miles away, then obviously I believe that the close packer has a competitive advantage over the distant packer because he has a great deal less freight. So he will probably tend to be a better buyer to me for my cattle under those circumstances than would the distant packer.

Q Pay more for the cattle?

A Yes.

Q Are you familiar with prices for fat cattle generally in the area surrounding your feedlot?

A Yes.

Q Prices received both by your feedlot and perhaps by others as well?

A Yes.

I see that every day.

Q Can you tell me whether or not there is much variation feedlot-to-feedlot on comparable cattle, for example?

[Pl. Ex. 76, Def. Ex. 7Y p. 27]

A Well, there is some variation. I wouldn't consider it a big variation. They are basically within relatively minor differences, if you want to call 50¢ a hundred minor, but that would be from center line 25¢ a hundred either way from the norm, from the median, within that basic trade area.

Now there are more differences than that if we go further away—the relationship between Nebraska and Texas, et cetera, Colorado and Kansas.

Q Tell me about that.

A Well, that, to me, is more a function—

Slaughter capacity is relatively constant, and supplies are not relatively constant. So if you have a situation where the Midwest—the cornbelt, as we will call it—has a surplus of cattle relevant to the packing capacity, then those prices will be lower than if it is in balance in Texas.

In the last few months, and very recently, in fact, Texas was premium to Nebraska, two or three months ago, because they were short in supply relevant to the packinghouse needs and we were not short in supply.

Q What's the magnitude of that premium?

A Well, it can be very easily a dollar per hundred-weight. The range from high to low could be $2 per hundred-weight, and it might be higher than that in very short [Pl. Ex. 76, Def. Ex. 7Y p. 28] periods of time.

Right now, our hiefers are worth about a dollar a hundred more than the heifers are in Texas, and our steers are worth equal to or a little higher than Texas, and yet three months ago their steers would bring one to two dollars more than our steers would here in Nebraska.

So those things do change over time as the supply-demand relationships change.

Q Is cost of grain a factor at all in that?

A Well, I guess if you really wanted to get down to the final depth. It is in the long term, because if grain gets more expensive in Texas relevant to Nebraska, then there tends to be a movement to be feeding more cattle in Nebraska because the investor in those cattle can get a cheaper cost of grain than he could from Texas, which has a higher cost of grain, so over the long term, that is. But within a single situation, once an animal is placed on feed until the time he is slaughtered, that would not have an effect on price. It's a long-term movement.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 29]

Q What caused the switch from the premium in Texas to now the premium in the cornbelt?

A A gradual decline of cattle availability in the Midwest and the cornbelt, and an increase in supplies in the Texas Panhandle, basically caused because a lot of cattle came off the wheat down there in May, and those cattle have just gotten ready for market in the past few [Pl. Ex. 76, Def. Ex. 7Y p. 30] weeks, and so their supplies and their feedlots are quite full, and their supplies have increased rather dramatically at the very same time that our supplies have diminished some.

Q Did you find the packingplants located in Texas were making more stops at your feedlot when your cattle were selling lower than the Texas cattle.

A Well, not necessarily.

When you say "Texas", not necessarily Texas packers, per se, but what happened is that all of a sudden the

Southern Kansas packers were much more interested in our cattle, which was like a domino effect. It was just being pushed up. Yes, they showed a great deal more interest three months ago than they are presently showing.

We didn't actually sell any cattle to Texas packers, but we did have a lot of interest from Kansas, Southwestern Kansas, packers, which are quite close to the Texas Panhandle.

That interest has diminished in the last few weeks.

Q Can you tell me why that would be?

A Because of the change in price structure.

As our cattle got more expensive in the relative sense, then they would rather buy their cattle closer to home and have less transportation on them.

[Pl. Ex. 76, Def. Ex. 7Y p. 31]

Q Mr. Roberts, you testified that the number of regular buyers at your feedlot has declined in the past year to 18 months, isn't that true?

A Yes.

Q I think we figured out that you've lost three packingplant buyers and gained one, isn't that right?

A That's right.

Q Has that made a difference to the conduct of your business?

A Yes, it has.

We normally have had, including the people that were there previously, we had what we would consider, in general, four excellent heifer buyers. We now only have two excellent heifer buyers, in our opinion.

Obviously, then, we have less people with which to ply our trade, to sell to and compete with one another

than we did before. It has been cut in half. We have tried very hard to not let that become a major factor, but it gives me great concern.

Q Why is that?

A Well, if one of those two current very competitive heifer buyers happens for one reason or another to drop out of the trade for any reason—the plant is down, they are already full, a number of things—then that leaves us with only one really good heifer buyer to sell to, and [Pl. Ex. 76, Def. Ex. 7Y p. 32] the competition, the trading between me and one buyer, doesn't give me much alternative if I want to sell cattle, certainly not the price alternative that I would like.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 34]

Q Mr. Roberts, you described the decline in number of buyers for your fed cattle. Do you have any opinion concerning a trend in the number of buyers generally for fed cattle in the Eastern Nebraska-Western Iowa area you've been talking about?

A Yes.

* * * *

Q What is that opinion?

A I've got some deep concerns about the direction that I see the packing industry going and the continued growth of the large packer and the continued decline in the number of smaller, independent packers.

Q Have you observed any particular impact on competition of that kind of trend?

A Yes, I have.

Q What does that do?

A Well, I believe that we have less competition today than we had 18 months ago for our product.

Q At your feedlot in Lexington?

A At my feedlot, that's true.

But beyond that, I don't limit that to just Lexington, Nebraska. I think I can say that's true of [Pl. Ex. 76, Def. Ex. 7Y p. 35] Central Nebraska, in general.

* * * *

Q Mr. Roberts, what is the basis for your knowledge of conditions in the fed-cattle procurement market in Eastern Nebraska?

[Pl. Ex. 76, Def. Ex. 7Y p. 36]

A I talk with individual feedlot operators nearly every day, almost every day, of the trading week.

In addition, I am in contact daily with the Cattle Fax operation in Denver, which gets those same trades from other areas broader than my own, and I stay very current on what the trades are in our areas each day through those two medias, plus the USDA Market Service.

Q Mr. Roberts, you expressed the opinion that you did not think this particular transaction would have a material impact on the conduct of your business in Lexington.

But then I think I can fairly say you expressed some concern about the effect more broadly spoken on the industry in general.

Can you tell me why you aren't as concerned about your own feedlot?

A Well, I am concerned about my own feedlot.

My concern is not on any one isolated instance.

My concern has been over the events over the last 18 months which, added together, I feel the impact of them, and my concern that should it continue the impact will be greater in the months and years ahead.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 57]

[CROSS EXAMINATION BY MR. EASON]

Q So most of the cost in shipping is incurred in loading the cattle, basically?

* * * *

A No.

Only a small portion of the cost is incurred in the initial shipment. The distance still does make a difference.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 64]

Q I would just like to go on to the question of transportation costs for a couple of minutes.

It's true, is it not, that transportation cost is not a direct function of distance?

[Pl. Ex. 76, Def. Ex. 7Y p. 65]

A No.

In general, I wouldn't agree with that.

It basically, other than very short hauls, is a direct function of distance.

* * * *

Q My question is this: Does it cost as much to send cattle 50 miles as it does cost to send cattle from 250 miles—from a point 250 miles distant from the feedlot to a point 300 miles distant from the feedlot? Within the realm of your experience, can you answer that question?

A I will try.

Once you get by the immediate short-haul situation of, say, just a few miles, from then on the factor of the cost of transportation is almost directly proportional to the distance.

Q So it's true that most costs are incurred in the initial short haul?

A No.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 66]

A No, no.

A very small proportion. As a percentage, they are more expensive for a short haul than they are a long haul, but once you get by that point, then they are directly proportional to the mileage.

* * * *

Q Is it true that improvements in trucks and highways have reduced the cost of transportation and the shrink of cattle in transit?

A That's two questions.

Number one, they have not reduced the cost of transportation. They may, because of the time element, have somewhat reduced the cost of shrink, but not a great deal.

Q Is it true that most shrink occurs within the first 100 miles?

A No.

That's a relative figure.

The majority—that is, a larger percentage—of shrink occurs in the first 100 miles than it does—I've got to answer this properly.

Cattle trucked 400 miles will shrink 5 percent. Cattle trucked 100 miles may only shrink 3 percent.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 67]

Q Mr. Roberts, correct me if I'm wrong, but it's true that your concern over what you consider to be the trend in the industry at this point is really a concern for what the future holds, is that true?

A Yes, that's true.

Q In other words, you expect the trend to continue, do you not?

A Well, I hope that it doesn't, but I'm fearful that it might.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 74]

Q In your inquiry and just general ruminations about concentration, Mr. Roberts, have you considered the possibility of new entry into the market?

A I have considered it, yes.

I do not feel that it will be highly probable because of the cost. Legally, it's perfectly fine. But when you come to the cost of entry, it's substantial.

* * * *

[Pl. Ex. 76, Def. Ex. 7Y p. 80]

REDIRECT EXAMINATION

By Mr. Hartley:

Q Mr. Roberts, I think I may have one question for you.

Mr. Eason asked whether or not it was your opinion, if there was viable price competition at your feedlot. I think your answer was "Yes". and you started to say something else, and he moved on to the next question.

Did you ever have a chance to complete that thought in response to either that question or a later one, or is there anything you want to add?

A Well, it's very difficult, as I said, to divide time sequences.

Viable competition—To say that there is not viable competition is not a true statement. To say that there is less competition than there was previously I think [Pl. Ex. 76, Def. Ex. 7Y p. 81] is a viable statement.

You have to look at time sequences and what happened to make that judgment.

Q What time sequence and what happened? I'm not sure I follow you.

A Well, in other words, I guess what I'm saying is that if you go back 18 months, we had more competition for our product than we have now. But to say that we don't have any competition now would not be a true statement. We simply have less than we had.

So it's a matter of comparison, rather than a flat statement about—It's all black or white here and it's all

black over here. It isn't that clearcut. It's a matter of change and what's happened, as opposed to yes, we did, and no, we don't.

* * * *

[Pl. Ex. 78, Def. Ex. 7S p. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

Telephone conference deposition of RONALD DUDLEY, taken pursuant to Notice of Taking Deposition, taken before William D. DeVahl, a Notary Public in and for the County of Ramsey, State of Minnesota, on Wednesday the 28th of September 1983, at E-1500 First National Bank Building in the city of St. Paul, Minnesota, commencing at approximately 4:00 o'clock p.m.

* * *

EXAMINATION

BY MR. EASON:

Q Mr. Dudley, would you state your full name and address and spell your last name?

A Yes, my name is Ronald G. Dudley, R-o-n-a-l-d G. D-u-d-l-e-y. My address is 2605 Urbandale Lane, Plymouth, Minnesota 55447.

Q What is your occupation, Mr. Dudley?

A I am a general manager with Land O' Lakes, In., [sic] with a title of group vice president and chief operating officer, commodities.

Q Mr. Dudley, do you recall a phone conversation you had with Mr. Kenneth Monfort in late May of 1983?

A Yes, I do.

Q Did this conversation occur at a time when you were acting in your capacity as group vice president and chief executive officer commodities for Land O' Lakes?

A Yes, it did.

Q In your capacity as group vice president and chief executive officer commodities, have you been responsible for dealing with inquiries and negotiations regarding the sale of certain assets of Land O' Lakes Spencer Beef Division?

[Pl. Ex. 78, Def. Ex. 7S p. 4]

A Yes, I have been involved.

Q Did your conversation with Mr. Monfort pertain to the disposition of those assests?

A Yes, it did.

Q. Had Mr. Monfort, as representative of Monfort of Colorado, contacted Land O' Lakes on previous occasions regarding the possible purchase of those assets?

A Yes, they had.

Q Do you recall who the representative was, or was it Mr. Monfort?

A My contact in a previous situation was with Don Mueller, who was a vice president with Monfort of Colorado.

Q Can you relate of [sic] substance of your contact with Mr. Mueller?

A Essentially Land O' Lakes had closed its operation abrasion in Schuyler, Nebraska on a temporary basis. There were rumors floating around that we were going to sell our operations.

Don Mueller contacted me to inform me that Ken Monfort had directed him to contact me to express an

interest in buying our assets if we were going to sell any of them.

Q Would you please relate the substance of [Pl. Ex. 78, Def. Ex. 7S p. 5] your conversation with Mr. Monfort in late May of 1983?

A Mr. Monfort called in late May to express information concerning his desire to continue discussions to buy our assets. His response to us was that he would not be able to have a price that would be close to what Land O' Lakes was seeking. He did not want to be involved in misleading us on his further interest, and that he felt the plants were not worth what we were saying they were worth.

He did not want to put forward a number, because he was afraid that perhaps by doing so, Mr. Ralph Hofstad, who is president and chief executive officer of Land O' Lakes, might be insulted.

I also inquired on that conversation as to whether Mr. Monfort would be interested in any of the plants singly. [sic] The response that was provided suggested that Mr. Monfort's first choice, if he were interested in a single plant, would be Oakland.

I was rather surprised by that response, since I felt that the Schuyler operation might be of greater interest. He expressed an opinion that he would rather have the Schuyler Plant down or closed.

He then, I believe, gave more reference to the fact that he did not want to show bad faith by [Pl. Ex. 78, Def. Ex. 7S p. 6] continuing discussions. That is the substance of the conversation.

* * * *

[Pl. Ex. 78, Def. Ex. 7S p. 11]

[CROSS] EXAMINATION

BY MR. McCLEARN:

Q My name is William McClearn,, and I'm the attorney representing Monfort in connection with this deposition, do you understand that, sir?

A Yes.

Q I'm confused. I had understood you to say that you were the chief operating officer of your commodities group, and I guess I heard Mr. Eason describe you as chief executive officer. Perhaps you could clear that up?

A I am chief operating officer of the commodities group.

Q Commodities group, I take it, is one of several groups of the Land O' Lakes Corporation?

A Yes.

Q Is your employment in connection with the meat or beef industry, Mr. Dudley, or does it relate to commodities which I tend to think of as something other than meat or beef?

A My responsibilities in commodities include all commodities of Land O' Lakes, including beef.

[Pl. Ex. 78, Def. Ex. 7S p. 12]

Q Mr. Ralph Hofstad, whom you mentioned earlier, he is the chief executive officer and president of Land O' Lakes, is he?

A That is correct.

Q In fact, you called Mr. Monfort on the occasion you have described at the request of Mr. Hofstad, did you not?

A On the call we are referring to, no, sir.

Q I refer you to the Exhibit that you have just identified, do you have it in front of you?

A That is correct?

Q I direct your attention to the top of the page that portion which you described as reminder notes, do you see that?

A Yes, sir.

Q On one of those notes following the number one says call Monfort, do you see that?

A That's correct.

Q Would you tell me what caused you to put that particular note on that piece of paper?

A Because this piece of paper had started out to reminder list of things that I was to do that day, and I was reminding myself to call Mr. Monfort that day.

* * * *

[Pl. Ex. 78, Def. Ex. 7S p. 13]

Q Did you call Mr. Monfort on that date?

A No, sir.

Q Is it your testimony he called you?

A Yes, sir.

Q The reason, however, that you had made a note to yourself to call Mr. Monfort on that day, was because you had been asked to do so by Mr. Hofstad, is that correct?

A That is correct.

Q You have been instructed by Mr. Hofstad to give certain production data relating to one or more of the Spencer Beef Plants to Mr. Monfort, is that not also correct?

A That is correct.

Q Can you describe in the most general way for me the kind of data you were to provide or give to Mr. Monfort over the telephone?

A I was asked to provide information relative to our plants in the same manner that we had provided other parties that might have been interested in those plants.

Q What was the general nature of that [Pl. Ex. 78, Def. Ex. 7S p. 14] information, if you please?

A The general nature of that information was a description that related to our killing capacities; our costs for a specific week in time, and some general observations on those facilities and their earnings power.

Q You had been requested to do that by Mr. Hofstad?

A That is correct.

Q Is your testimony that before you had an opportunity to call Mr. Monfort, he, instead, called you?

A That is correct.

Q You then had the conversation that you have just described to us, is that correct?

A That is correct.

Q As I understand your testimony, the conversation started off by Mr. Monfort indicating to you that the kind of pricing that Land O' Lakes was talking about would not even be close to something he would be interested in?

A That is correct.

Q Under the circumstances, he didn't want to lead anyone on to further discussions, I gather, is that also correct?

[Pl. Ex. 78, Def. Ex. 7S p. 15]

A That is my interpretation, yes.

Q He went on to tell you he thought the three plants, at least in his view, were not worth nearly as much as Land O' Lakes had said they were offering them for?

A That is correct.

Q The end result of the conversation was that he said that, in effect—information he got from you of the kind you just told us about, the production and other information, he would just be nosey, or words to that effect, is that true?

A I can't recall whether the word nosey was used or not, but the implication or gist of what you say is correct.

Q In fact, you did not give Mr. Monfort any of the information that you had available and that Mr. Hofstad had requested you make available to Mr. Monfort, is that correct?

A That is correct.

Q It is true that he was not given any information of any kind in the telephone conversation with you with respect to the three Spencer Beef Plants?

A That is correct.

Q Had you ever met or spoken with Ken Monfort [Pl. Ex. 78, Def. Ex. 7S p. 16] before the day on which you had this telephone conversation with him, Mr. Dudley?

A Yes, I had.

Q Under what circumstances had your prior conversations taken place?

A I had talked to Mr. Monfort on the prior night.

Q Was that a conversation that had been made to his home, was he at home when you spoke with him the prior night?

A That is correct.

Q Had you spoken with him on any earlier occasions, had you met him?

A No, I have not ever met Mr. Ken Monfort.

Q Have you talked with him either by phone or in person since the conversation that you have just described to us?

A No, I have not.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

The deposition of PHIL BOUCKAERT was taken on behalf of the Defendants before Patricia J. Schneider, Notary Public for the State of Kentucky at Large, at the offices of Kentucky Fried Chicken Corporation, 1441 Gardiner Lane, Louisville, Kentucky, on September 27, 1983, at 6:30 p.m. Said deposition was taken pursuant to stipulation of counsel and for all purposes provided by the Federal Rules of Civil Procedure.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 2]

PHIL BOUCKAERT, called upon oral examination by counsel for the Defendants, after having been first duly sworn, was examined and deposed as follows:

EXAMINATION

BY MR. RAM:

Q. Would you tell us your name, please?

A. My name is Phil Bouckaert, B-o-u-c-k-a-e-r-t.

Q. What is your residence address, Mr. Bouckaert?

[Pl. Ex. 79, Def. Ex. 7R p. 3]

A. My residence address? Highway 42 in Warsaw, Kentucky.

Q. And your business address?

A. Business address is Kentucky Fried Chicken Corporation, 1441 Gardiner Lane, Louisville, Kentucky.

Q. By whom are you employed?

A. I'm employed by Kentucky Fried Chicken Corporation.

Q. What is your position with Kentucky Fried Chicken Corporation?

A. I'm vice president of technical services and research and development group.

Q. How long have you been with Kentucky Fried Chicken?

A. It will be five years in June, next June, June of '84.

Q. Who did you work for before Kentucky Fried Chicken?

A. Before Kentucky Fried Chicken I was with the Great A&P Tea Company in their headquarters in Montvale, New Jersey.

Q. What were the dates of your employment with A&P?

[Pl. Ex. 79, Def. Ex. 7R p. 4]

A. I was with them from June of '76 until June of '79. I think that's right. Yeah, three years.

Q. What was your position with A&P?

A. I was director of productivity and retail engineering.

Q. What were your job responsibilities as director of productivity and retail engineering?

A. Primarily had to do with all of the store operating systems and the support facilities for stores; that is, everything from store layout to store packaging to the meat.

produce, to support facilities such as warehouses, meat fabricating plants, meat distribution facilities, produce distribution facilities. In other words, everything that had an impact on store operations and the support of store operations.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 5]

Q. In that function, you were responsible for --

A. I'd be responsible for, in other words, the economic analysis of receiving beef from various suppliers: were they good suppliers, was the product from A better that product from B economically speaking in yields, product utilization, things of this nature; delivery schedules, condition of product on arrival, unloading, unloading times. In other words, everything that impacted on the cost of the system.

Q. Who did you work for before A&P?

A. Before A&P I spent two years in my own consulting firm headquartered in Cincinnati, and primarily I was doing supermarket consulting and meat processing consulting for the [Pl. Ex. 79, Def. Ex. 7R p. 6] supermarket industry and meat packers.

Q. To which companies were you a consultant during that time?

A. Some of my primary clients were Pic'n Pay Supermarkets in Cleveland, Gem Supermarkets in Detroit, Dinner Bell Meats in Cleveland, Dinner Bell Foods in Defiance, PA&S Small in Harrisburg, Pennsylvania. And then I did some work with, like, the Supermarket Institute and people like that.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 7]

Q. By whom were you employed prior to working as a private consultant.

A. I spent -- the bulk of my career prior to that, about 16 years worth, with Kroger in their headquarters in Cincinnati, and again in a very similar function to what I did at A&P. In other words, I basically started out as what was called a quota meats industrial engineer because they didn't know what else to call it. And the job there was basically design the meat systems and do the meat systems development and control from the standpoint of equipment, layout, methods, procedures, and on down the line. I ended up my positions and my work there as manager of processing and packaging engineering for Kroger.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 8]

Q. What were the dates of your employment with the Kroger Company?

A. From '58 through '74.

Q. What was your last position with the Kroger Company?

A. I was director of processing and packaging engineering.

Q. What were your job responsibilities as director of processing and packaging engineering for Kroger?

A. I was responsible again for the store systems and the development of all the store systems, whether it was processing and packaging meat, produce, and all those others, as well as the support systems: the warehouses, meat plants, produce plants and their operations and cost control.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 34]

[CROSS EXAMINATION BY MR. RASTELLO]

Q. Mr. Bouckaert, at the time you left Kroger, approximately what percentage of Kroger's retail needs was -- retail beef product needs were being supplied from its own fabrication facilities?

A. They were fabricating probably about 90 percent of their requirements. Just so you understand, a Kroger meat plant is two things. It's a fabrication plant and it's also a distribution center. So it they bought boxed beef and pork and poultry, the whole nine yards came through that plant, a portion of which -- in other words, an area of this plant did fabricating, which in turn put it into the [Pl. Ex. 79, Def. Ex. 7R p. 35] shipping lines so they can ship it to stores. A store may or may not know whether or not it was even fabricated in the plant versus bought as fabricated beef.

Q. I understand that. At the time Kroger was supplying 90 percent of its beef requirements from its own production, at what percentage capacity were its fabrication facilities operating?

* * * *

A. Ninety percent of their output was fabricated in their own plants and the [Pl. Ex. 79, Def. Ex. 7R p. 36] other ten percent they bought as boxed beef or is primal cuts not vacuum-packed.

Q. Returning to my original question, then, Mr. Bouckaert, at the time that Kroger was producing 90 percent -- or supplying 90 percent of its beef requirements through its own facilities, at what percentage capacity were its facilities operating?

A. Based on design capacity and the capacity they were capable of doing on a one-shift operation, they were probably operating about 80 percent of capacity.

Q. At that time, Kroger's boxed beef purchases only accounted for approximately ten percent of their beef requirements; is that correct?

A. Yeah. I would buy that, yeah. About ten percent.

Q. Do you know if that's still true today?

A. On a week-to-week basis, incidentally. This might vary. I just don't want anybody to lift all this stuff out of context.

Q. Do you know if that is still [Pl. Ex. 79, Def. Ex. 7R p. 37] true today?

* * * *

A. Based on the information I have, talking to people still at Kroger, friends of mine, that's basically still true today. As long as they own the plant and are operating the plant, you're either using boxed beef for fill-in, again, or the price spread got to the point where it's a good business decision not to fab it yourself.

* * * *

Q. Yesterday when we spoke, Mr. Bouckaert, you mentioned some of the economic advantages of boxed beef compared to swinging beef. Do you recall that?

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 38]

A. Yes. The answer to that is yes, and there are economic advantages to a retailer for buying boxed beef versus swinging beef.

[Pl. Ex. 79, Def. Ex. 7R p. 39]

Q. What are those economic advantages?

A. The economic advantages are that he doesn't have all of the rough cuts, doesn't pay freight on the fat and bone that's eliminated at the fabricator, he can buy normally the cuts that he needs to support his business and not buy quarters of beef or swinging beef and have to train people to break it and cut it up into pieces. That's been done for him by the fabricator.

Q. Why does Kroger continue to fabricate its own beef requirements in light of the economic advantages of boxed beef?

A. Because a retailer with enough volume, there is additional economic advantages to what's called further fabrication by having your own plant. A Kroger plant will fabricate primal cuts and subprimal cuts to a more stringent and different specification than is standard in the boxed beef industry. They will then take the rough cuts such as the short ribs, boiling beef, shanks, flanks, things of this nature, and have the option of working these up into ground beef, into stew meats, into [Pl. Ex. 79, Def. Ex. 7R p. 40] prepackaged short ribs, boiling beef, cross-cut shanks, things of this nature.

So there are a lot of further economics to a retailer, providing they own the volume to support the plant, in doing it themselves. So there's three levels to the industry if you look at it: the swinging beef, the boxed beef to the retail prefabricating operation.

Q. Is there a difference between what you referred to yesterday in a conversation with me as packer cuts and retailer cuts?

A. Right.

* * * *

Q. Would you please tell me what your definition of the difference is between packer cuts and retailer cuts?

A. As I just described, if a -- in a Kroger plant, for example, the specifications for a beef short loin would be different than you would find in the normal packer trade; different in that, for example, if that particular retail -- let's take here in Louisville where they, Kroger, features tailless [Pl. Ex. 79, Def. Ex. 7R p. 41] T-bone and porterhouse steaks. All the tail would really be removed at the plant. A packer would normally not want to do this for you because he would have to isolate those cuts way early in his distribution cycle and have this meat specially tagged for you. It wouldn't be a standard item, and therefore would really compound his operations.

Q. Is that another way of saying that a retailer may desire to fabricate its own beef because it's able to tailor its product to its own retail needs?

A. Right. In other words, he can tailor closer to his own retail needs and he's got the alternatives for the pieces that aren't exactly moving at a pace where he can do something with them. In other words, he might take a pocket of stores and feature stew beef, for example, that he wouldn't do if all the stew beef was spread around 50 stores.

Q. Does Kroger also fabricate because it's able to utilize its by-products profitably, whereas it would not be able to do so if it bought boxed beef?

A. If you're calling the [Pl. Ex. 79, Def. Ex. 7R p. 42] by-products again these trimmings and these short ribs and the bottom beef and the tails of the steaks and things, yes, that's the big economic impact; that and being able to prepackage it at the central level. In other words, they are preparing retail prepackaged product at the fabrication

point and shipping it to the store ready for the case, similar to what the poultry industry has done, Tyson and Holly Farms being the two big ones in what's called case-ready prepackaged chicken. So it's ready for the retailer to just put it in the case and go.

Q. So in your opinion, there is a difference between what we would term boxed beef or packer cuts from retailer cuts.

A. Right.

Q. Is that correct?

A. That's correct.

Q. Yesterday when we spoke, you also mentioned an advantage of a retailer fabricator as being able to tailor its retailer cuts to individual geographic markets.

A. Right.

* * * *

[Pl. Ex. 79, Def. Ex. 7R p. 43]

Q. Is that correct?

A. That's correct. In other words, for example, Kroger here in Louisville out of the plant here would break the beef and prepare the primal cuts and the subprimals to meet the market they have right here; my example on taking all the tail off the loins because they're going to sell tailless steaks. If you go to a different plant, because of the competitive reasons or because of the merchandising program, maybe they're selling tail on and they want a two-inch tail on the steaks in that market, so they would leave a two-inch tail on those primals in that plant. Or it could be a plant is producing both because they're supplying more than one geographic area of Kroger.

The Louisville plant here, for example, supplied Louisville; did one in Salem, Virginia that supplied both Charleston -- all of West Virginia and Virginia. They have a plant, like, for example, in Cleveland that only did Cleveland; one in Detroit that does the entire state of Michigan. So you've got different marketing areas. And this way you have more flexibility. And this also is the utilization of [Pl. Ex. 79, Def. Ex. 7R p. 44] these rough cuts and other cuts so that you balance out.

Q. Once a retailer has committed to boxed beef, is it a viable option for the retailer to go back to breaking and fabricating its own beef products from swinging beef?

* * * *

A. If you were a retailer and you're buying boxed beef today, if I understand your question now, and you said could it be in your business interest to go into the beef fabricating business. Is that really the nut of your question?

* * * *

A. Let me put it this way. If you were a retailer and you went into boxed beef, over a period of years you would build stores to accommodate boxed beef, not swinging beef. So it would not be viable for you over the long run to [Pl. Ex. 79, Def. Ex. 7R p. 45] go back to swinging beef. However, it could be that you want to go into your own beef fabricating operation, which is what I thought you had said.

[Pl. Ex. 79, Def. Ex. 7R p. 45]

Yeah, I could decide that I now own enough stores and I have enough volume and I'm in XYZ geographic area and I want to put in my own fab plant. But you can't go in and out of the market between swinging beef and boxed beef by store. The store is either on boxed beef or it's on swinging beef because you build it to accommodate that or you build out of it.

Part of the savings if you go into boxed beef is you don't have rails and all the structural steel it takes to support a rail system to handle swinging beef.

Q. When you were with Kroger, did Kroger obtain the vast majority of its carcass supply from local slaughterers?

A. It was mixed; again, depending on market conditions and depending on geographic area of the plant. They did -- Kroger is basically located throughout the midwest. They have plants, for example, in Detroit, Cleveland, Columbus, Cincinnati, Louisville, Atlanta, Dallas. [Pl. Ex. 79, Def. Ex. 7R p. 46]So it's a complete mixed bag. They bought all their beef centrally. Cincinnati bought all the beef. And therefore, we assessed all of the vendors from Cincinnati and what were the yields and did they maintain good grades and cutability and all that good stuff. So it was purchased, again, depending on market conditions.

Q. Was the transportation cost a major factor in determining --

A. Yeah. In other words, the further away you were from the plant, the more competitive your price would have to be because somebody has got to pay the freight to get it in there. We normally look at -- and this is true in all the meat businesses. You look at delivered price even though you quote FOB price. Even here when we look at a poultry supplier, we're looking at what it costs us delivered to the store in the end result.

* * * *

[Pl. Ex. 80, Def. Ex. 7U p. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DEPOSITION OF HARRY K. KNOBBE
September 22, 1983

PURSUANT TO NOTICE, the deposition of HARRY K. KNOBBE was taken on behalf of the Defendants at 36th & Farnam, Omaha, Nebraska at 11:15 a.m., before Carol Patterson, Registered Professional Reporter and Notary Public within Colorado.

[Pl. Ex. 80, Def. Ex. 7U p. 4]

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * *

HARRY K. KNOBBE, having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. EASON:

Q Would you state your name and address for the record, please, and spell your last name.

A My name is Harry K. Knobbe, K-n-o-b-b-e. My address is Post Office Box 8, West Point, Nebraska.

Q Mr. Knobbe, how long have you lived in the West Point area?

A All my life.

Q And how old are you now?

A 43.

Q What sort of business are you in, Mr. Knobbe?

A I'm in the cattle feeding and farming and livestock sales business and commodity business, also.

Q And for what length of time have you been in the business of finishing and selling fat cattle?

A 23 years.

Q Could you tell me how many head you sell a year, on the average?

[Pl. Ex. 80, Def. Ex. 7U p. 5]

A In the past years, I have merchandised about 20,000 cattle a year.

Q Could you tell me who you sell to in the normal course of your business?

A In the normal course of time I sell to Iowa Beef, Missouri Beef and Union Pack and some small packing houses in the Omaha area.

Q By Missouri Beef, do you mean Excel?

A Excel, right, I'm sorry.

****

[Pl. Ex. 80, Def. Ex. 7U p. 9]

Q (BY MR. EASON) Would you say, based upon your [Pl. Ex. 80, Def. Ex. 7U p. 10] experience as a feedlot owner/operator, the prices tend to be uniform in the areas for selling and buying fat and feeder cattle east of the Rocky Mountains?

A Yes.

****

[Pl. Ex. 80, Def. Ex. 7U p. 13]

[CROSS EXAMINATION BY MR. RASTELLO]

Q During the past year, what percentage of your cattle have you sold to Excel, approximately?

A One-third to one-half. I would say closer to [Pl. Ex. 80, Def. Ex. 7U p. 14] one-third.

Q What percentages have you sold to Monfort?

A This past year?

Q Yes.

A None, I don't believe.

****

[Pl. Ex. 80, Def. Ex. 7U p. 15]

Q Have you entered into any forward contracts with Excel?

A In the past five years?

Q Yes.

A Yes, I believe in the last five years we had [Pl. Ex. 80, Def. Ex. 7U p.16] have forward contracted some cattle.

Q In the past year?

A I don't think so, but there again, I'm not the—I do not sell the cattle at my operation; you know, not that I can recall.

Q Who sells the cattle?

A Gary Kulp, a cattle representative.

Q So you are not that involved in the selling of the cattle?

A Directly no, I am not. I participate with it at times.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 19]

Q Well, during—well, of course, the Schuyler plant has been closed. During the past five years have you sold to Spencer?

A I don't believe so in the past. Maybe four to five years ago we did, maybe, but not in this last year or two—or the last two years. But there is a representative in our area.

Q What is his name?

A Mr. Lemco—Richard Lemco.

Q Has he called upon you in the past, or your company, concerning purchasing cattle in the past five years?

[Pl. Ex. 80, Def. Ex. 7U p. 20]

A Yes, he has.

• • • •

Q I understand that one of the reasons you are in favor of the merger between Excel and Spencer to be that Excel intends to reopen the Schuyler plant; is that correct?

A Well, is it a merger?

Q It's an acquisition.

A Okay. Well, I'm interested in seeing the Schuyler plant opened.

Q Does it matter to you who reopens the Schuyler plant?

A No, not at all.

Q Would it be better for your interest if a company who was not presently one of your buyers were to purchase Spencer?

A That would be fine with me, yes.

Q Would it be better financially for you?

A For myself?

Q Yes.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 21]

Q And do you agree with the statement that the more purchasers of your cattle that there are in your area, the better chance you have of receiving a higher price?

A The more chances of our area, not just myself; the more chances of our area having more buyers?

Q Yes.

[Pl. Ex. 80, Def. Ex. 7U p. 26]

Q You testified that you sold between one-third and one-half of your cattle supply to Excel; is that correct?

A Yes.

Q Is that primarily to the Rockport plant?

A Yes.

Q And how many miles is the Rockport plant from you? [Pl. Ex. 80, Def. Ex. 7U p. 27]

A 130 miles.

Q And how far are the IBP plants that you sell your cattle to?

A Well, one is four. One is 60 and 80 and 250 and—

Q Would it be fair to state that you sell approximately 90 percent of your cattle within 130 miles of your feedlot?

A Yes.

Q 95 percent?

A Approximately, maybe.

Q In the past year have you sold any cattle to buyers east of Chicago?

A Pardon me, would you repeat your question?

Q In the past year have you sold any cattle to buyers east of Chicago?

* * * *

A You are talking about fat cattle?

Q (BY MR. RASTELLO) Yes. Talking about fed steers and heifers.

A I don't believe so.

[Pl. Ex. 80, Def. Ex. 7U p 28]

Q You testified that opening the Schuyler plant will support prices, quote, in our area and Nebraska generally; is that correct?

A Yes.

Q And that was because it would increase demand?

A Yes.

Q Is transportation costs a factor in your profits?

A Yes.

Q And the reason transportation is a factor is because it costs more to transport cattle and because of the shrinkage of the cattle enroute; is that correct?

A No. It's just the freight; the freight is different. The shrinkage would be the same, no matter where you go.

Q Would the shrinkage be the same if someone shipped cattle from West Point, Nebraska to New York City, compared to Rockport, Missouri?

A Well, that's—No, that's different—New York City.

Q Is that because of the distance?

A Yes. We base our weights on our scales; and whether the cattle go to New York City or Missouri Beef, it's our weight scale—our weight at our scales.

Q But that would affect the price that a buyer would be willing to pay for it; he would consider the [Pl. Ex. 80, Def. Ex. 7U p. 29] shrinkage that could be expected?

A The tissue shrinkage or the live shrinkage?

Q Either.

A The live shrinkage doesn't make any difference.

Q But the tissue shrinkage does?

A To New York.

Q You testified that your normal sales area was within 130 miles of your feedlot?

A Yes, for our feedlot of the cattle that we have at our feedlot.

Q Do you normally sell cattle outside the western cornbelt?

A No.

Q Do many of your contemporary cattle feeders sell any cattle outside the western cornbelt?

A No.

* * * *

Q (BY MR. RASTELLO) Please, define the western cornbelt.

A Nebraska; the State of Nebraska.

Q Would that include western Iowa, also?

A Yes.

Q And southern Minnesota?

A Yes. That's the cornbelt.

[Pl. Ex. 80, Def. Ex. 7U p. 30]

Q So generally—I'm not sure if you answered the question—generally, cattle feeders in the area of Omaha, Nebraska and in western Nebraska would not sell their cattle outside of the western cornbelt? Would that be a fair statement?

A Yes.

Q So their familiarity or even concern with prices east of the western cornbelt would not really affect them; would that be a fair statement?

A Uh-huh.

Q I'm sorry, you will have to answer yes or no.

A Yes, yes.

Q What percentage of your cattle were steers and heifers during the past year?

A I have no idea. I would guess approximately half.

Q What would the other half be?

A Half steers, half heifers.

Q I'm sorry, I wasn't very clear on the question. What percentage of cows and bulls do you raise?

A None.

Q Why is that?

A Well, we are a fat-cattle feedlot. We fatten cattle, any heifers or steers.

Q Do you purchase most of your grain within 50 [Pl. Ex. 80, Def. Ex. 7U p. 31] miles of your feedlot?

A Yes.

Q Is transportation of grain a factor in your profitability?

A We pay so much for grain, whether it's transported five miles or wherever it comes from.

Q Would it be—

A And the seller transports it to us.

Q Would it make a difference in your profitability picture if you were forced to purchase your grain from 500 miles away versus 50?

A Well, yes, it would then if there was no grain around us.

* * * *

[Pl. Ex. 80, Def. Ex. 7U p. 32]

Q Are you aware of the price differences between what buyers are willing to pay for cattle located in the western cornbelt area versus the southwest or east?

A From day to day?

Q Yes.

A Yes.

Q Is there a difference?

A Oh, yes.

[Pl. Ex. 80, Def. Ex. 7U p. 33]

Q Would you give me an example of the most—

A Well, today, at present time this month there is more of a supply in cattle—of fat cattle in Texas than there is in Nebraska. So the cattle price in Texas is lower than it is in Nebraska.

• • • •

Q (BY MR. RASTELLO) Does the proximity of a beef packing plant to a feedlot affect the price of cattle?

A Sure. Yes, it does. Yes.

Q And that is because of the transportation costs?

A Not necessarily of the transportation costs. It just creates more demand in the area.

Q But is transportation costs also a factor?

A At times, yes.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 34]

Q Would it be fair to state that most of the cattle feeders in the West Point area market their cattle within a hundred-mile radius?

A Approximately, yes. Approximately, yes.

Q What are some of the reasons that cattle feeding tends to be concentrated in various areas—for example, in the western cornbelt area?

A Sometimes the grain attracts it. Sometimes soil conditions for feedlots and packing houses located in certain areas attract more feedlots.

Q Why is that third factor?

A Well, it creates—There is a market in the area for fat cattle, so sometimes fat cattle feedlots will go by the area.

[Pl. Ex. 80, Def. Ex. 7U p. 35]

Q Would it be fair to state that you do not really care who reopens the Schuyler plant?

A Yes.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 37]

[REDIRECT EXAMINATION BY MR. EASON]

Q How long during that 20-year period were you directly involved in a hands-on way with the selling end of the business?

A All but the last three to four years.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 38]

Q Now, Mr. Rastello asked you some questions about selling to people in New York. I want you to assume that the [Pl. Ex. 80, Def. Ex. 7U p. 39] packers in the western cornbelt and the region roughly approximating that area depressed the prices for fat cattle by $5 a head. If a buyer in New York was willing to pay you $5 to $6 a head more than those prices, could you sell to him profitably?

A Well, to answer that question, I would sell to anyone, whether New York or anywhere, and it would be at my weights, at my place; and if the freight was—if the freight would offset—or we are interested in the net figure, would be the same as, say, Iowa Beef or someone locally, we could sell to them because that would create more demand because Iowa Beef or Excel or someone else would have to pay more for cattle around.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 40]

Q (BY MR. HANLEY) Is it true that most of the cost of transporting cattle is incurred in taking the cattle [Pl. Ex. 80, Def. Ex. 7U p. 41] out of the pen and putting them on the truck and then taking them off the truck and putting them back in the pen; loading and unloading costs?

A There is not really a loading or unloading cost. I mean, the cost is the mileage cost.

Q But it is true it becomes cheaper the farther you send the cattle; that extra 100 miles?

A Yes, it is. Yes, slightly.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 44]

[RECROSS] EXAMINATION

BY MR. RASTELLO:

Q Mr. Knobbe, what is the present going rate of the price for fed steers and heifers right now locally?

A The price of fat cattle?

Q Yes, fat cattle.

A About 60 and a half for steers live.

Q $60?

A 60 and a half, yes, for steers.

Q How about for heifers?

A 56 and a half.

Q Let's stay with steers at $60.50. Who is offering that price that you are aware of?

A Today?

Q Yes.

A Well, I have not been in contact with anyone like today.

Q Well, how about yesterday?

A Well, yesterday I wasn't in contact, either.

Q Is that pretty much the price—

A I mean, that's what I hear approximately on the radio yesterday.

[Pl. Ex. 80, Def. Ex. 7U p. 45]

Q Do you know what a packer in Pittsburgh is offering?

A I have no idea. I don't know if there is a packer in Pittsburgh.

Q How about New York City?

A No.

• • • •

Q How much would a New York packer have to offer you today per head to offset the additional cost of transporting your fat cattle to New York City?

A I don't know what the freight would be to New York City. I would have to figure it out. I would have to calculate it out.

Q Can you give me an estimate.

MR. RASTELLO: Counsel, it's my recross.

A What I'm interested—I guess the way I would answer the question, I would let him pay the freight and I want 60 and a half at my place.

[Pl. Ex. 80, Def. Ex. 7U p. 46]

Q (BY MR. RASTELLO) As a practical matter, that doesn't happen, though, does it, Mr. Knobbe?

A No. You mean that a packer pays the freight or that a New York—

Q.That a new York Packer—

A Yes.

Q —will purchase your cattle; is that correct?

A Yes, that's right.

Q In fact, the area in which you sell your cattle is generally within that 130 mile radius which we spoke about before?

A Yes.

Q And it really would not be fair to say that the price for fat cattle is uniform between the Rocky Mountains and the eastern seaboard?

A No, they are not uniform at times.

Q At times they are uniform?

A Well, that's a broad area from—I mean—

Q That is a broad area.

A Yes.

Q And because of the freight transportation differentials, as a practical matter, it would not be fair to say prices are uniform; would that be a fair statement?

A Repeat that again.

Q Would it be a fair statement to say that the [Pl. Ex. 80, Def. Ex. 7U p. 47] price paid for fat cattle by packers is uniform between the Rocky Mountains and the eastern seaboard?

A Figuring the freight in?

Q In figuring the freight in.

A Well, I regard uniform as about 50 cents a hundred because cattle vary day to day in prices and how they supply it. So what they pay this minute, they may not pay in an hour.

Q I understand that, but in terms of the prices being uniform from the Rocky Mountain region to the East Coast, it would not be a fair statement to say that prices are geneally uniform?

A I guess I don't care to answer the question because I'm not—you know, yes or no; I mean—Well, okay. If a packer, for instance, in New York City bought my cattle, when it comes down to his net boxed cost, he has the freight in the live, and he has to figure the difference of buying carcasses over live; and it's not apt to—he is not apt to buy live because it would cost more to freight the off-fall to the East Coast live. So you—

Q So as a practical matter—

A I don't think there is packing houses in New York City.

Q As a practical matter, that's what I'm trying to get at; it's just not fair to state that there is a uniform [Pl. Ex. 80, Def. Ex. 7U p. 48] price for fat cattle in that region or that area we are talking about?

A That's three-fourths of the United States you are talking about.

• • • •

[Pl. Ex. 80, Def. Ex. 7U p. 50]

Q Would you mind telling me again how much it costs to transport fed steers and heifers?

A Okay. It costs approximately $1.70 a mile one way, and the approximate weight hauled is 50,000 pounds.

Q Which is a normal load?

A A normal load.

Q So 1,000 miles would be $1700; is that correct?

A Yes.

Q And 50,000 pounds would be how many head? About 50?

A Depends on what they weigh per head. 45.

Q 45. So that would be $39 more per head approximately to ship it 1,000 miles; is that correct?

A If your figures are right.

Q Do you know what your costs of shipping your cattle to the Schuyler plant were when it was open?

A Approximately, depending on backhauls or if you are going—approximately 40 cents a hundred.

Q Is that 40 cents—

A Per hundred weight.

Q —per hundred weight. So that would be about 4 to $5?

A Yes.

Q So you would have to receive from a packer 1,000 miles away approximately $30 more per head in order to make it [Pl. Ex. 80, Def. Ex. 7U p. 51] worth your while to sell?

A Yes.

• • • •

Q (By Mr. Rastello) and as a practical matter, Mr. Knobbe, that is just not a present market condition, is it?

A. That's correct.

• • •

[Pl. Ex. 80, Def. Ex. 7U p. 52]

Q Let me start over. You have testified that you were currently sustaining losses—

A Yes.

Q —on your fat cattle because of the depressed prices.

A Yes.

Q During the past six months have you sold, or has your company sold cattle outside of any regions other than the western cornbelt?

A No.

Q Can you tell me why?

A Because the price is not any higher there than at home.

Q Does the additional transporation cost have an affect upon the net price you receive?

A Sure, yes.

• • • •

[Pl. Ex. 81, Def. Ex. 7Q p. 1]

UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLORADO

Civil Action No. 83-F-1318

[Title Omitted in Printing]

STATE OF FLORIDA

COUNTY OF DUVAL

Deposition of HUGH F. MINSHEW, taken on behalf of defendants herein, pursuant to agreement of counsel, at 5050 Edgewood Court, Jacksonville, Duval County, Florida, on Friday, September 23, 1983, at 12:45 p.m., before Sandra Crowley, CSR, RPR, CM, and Notary Public in and for the State of Florida at Large.

[Pl. Ex. 81, Def. Ex. 7Q p. 4]

HUGH F. MINSHEW, having been produced and first duly sworn as a witness on behalf of defendants herein, testified as follows:

DIRECT EXAMINATION

BY MR. RAM:

Q Would you tell us your name, please.

A Hugh F. Minshew.

Q And would you spell your last name for the court reporter?

A M-i-n-s-h-e-w.

Q Where do you live?

A Jacksonville, Florida.

Q And by what company are you employed?

A Winn Dixie Stores, Inc.

Q What is Winn Dixie Stores?

A Supermarket chain.

Q What is your business address?

A 5050 Edgewood Court, Jacksonville.

Q What is your position with Winn Dixie?

A Vice-president and director of meat merchandising.

Q What are your duties as director of meat merchandising?

A To direct the meat merchandising program for Winn Dixie Stores.

Q Are you responsible for the procurement of beef [Pl. Ex. 81, Def. Ex. 7Q, p. 5] and other meats for fabrication and retail sale?

A Yes.

Q How long have you been the director of meat merchandising for Winn Dixie?

A Five years.

Q How long have you been employed by Winn Dixie?

A 28 years.

Q How many of those 28 years have you worked in Winn Dixie's meat program?

A 28 years.

Q What positions have you held with Winn Dixie?

A Meat cutter, market manager, field merchandiser, buyer, car lot buyer, meat merchandiser, and director of meat merchandising.

Q Does Winn Dixie purchase boxed beef?

A Yes.

Q What does Winn Dixie do with the boxed beef it purchases?

A Sells to the retail trade or retail consumer.

Q From how many suppliers does Winn Dixie purchase boxed beef?

A Approximately 12 to 20.

Q Do the suppliers who sell boxed beef to Winn Dixie include some companies who slaughter as well as fabricate?

A Yes.

[Pl. Ex. 81, Def. Ex. 7Q p. 6]

Q What are those companies called? Would you call those companies packers?

A Packers, yes.

Q Do the suppliers who sell boxed beef to Winn Dixie include some companies who only fabricate and do not slaughter?

A Yes.

Q What are those companies called?

A Basically they're called breakers.

Q Is boxed beef sold by breakers any different from boxed beef sold by packers?

A No.

Q When Winn Dixie buys boxed beef, does it base its decision at all on whether the supplier is a packer or a breaker?

A No.

Q In addition to boxed beef, does Winn Dixie also purchase beef carcasses?

A Yes.

Q From how many suppliers does Winn Dixie purchase beef carcasses?

A Between 12 and 20.

Q What does Winn Dixie do with the beef carcasses it purchases?

A We fabricate it.

[Pl. Ex. 81, Def. Ex. 7Q p. 7]

Q And after you fabricate the beef carcasses that Winn Dixie purchases, what do you do with the meat?

A It is sold in our retail stores.

Q If the price of boxed beef were to increase significantly in comparison to carcass beef, would Winn Dixie reduce its purchases of boxed beef and increase its purchases of carcass beef?

A Yes.

Q If the price of carcass beef were to increase significantly in comparison to boxed beef, would Winn Dixie purchase more boxed beef and less carcass beef?

A Yes.

Q Does Winn Dixie purchase primal and subprimal cuts of beef that are not vacuum-packed?

A Yes.

Q If the price of boxed beef were to increase significantly in comparison to the price of primals and subprimals that are not vacuum-packed, would Winn Dixie

purchase more primal and subprimal cuts that are not vacuum-packed and less boxed beef?

A Yes.

• • • •

[Pl. Ex. 81, Def. Ex. 7Q p. 8]

CROSS-EXAMINATION

BY MR. RASTELLO:

Q Mr. Minshew, my name is Timothy Rastello. We spoke earlier this morning. I represent Monfort of Colorado, Inc., and we are the plaintiffs in a lawsuit presently pending before Judge Finesilver in the District Court for the State of Colorado, United States District Court.

How many fabrication plants do you presently operate?

A 14.

Q And is all of the meat that you fabricate supplied to Winn Dixie Stores?

A Yes.

Q And your fabrications plants do not sell any of its [Pl. Ex. 81, Def. Ex. 7Q, p. 9] product to others than Winn Dixie's retail outlets?

A That's right.

Q So it is a totally captive operation?

• • • •

[Pl. Ex. 81, Def.Ex. p. 9]

THE WITNESS: Yes.

BY MR. RASTELLO:

Q Does Winn Dixie have any intention of supplying other retailers or other buyers of beef products other than its captive market?

• • • •

A No.

• • • •

[Pl. Ex. 81, Def. Ex. 7Q p. 10]

Q This morning when we spoke, Mr. Minshew, you mentioned to me that the primary reason for Winn Dixie engaging in fabrication was that it could maintain control over both qualify [sic] and the flexibility in its meat merchandising. Does that statement remain true at this moment?

A Yes.

• • • •

Q In other words, who supplies—who is the number one supplier of the boxed beef which is purchased by Winn Dixie?

A It lies between Excel and IBP. I would think that Excel would be number one.

Q Do you also purchase some carcasses from Excel for [Pl. Ex. 81, Def. Ex. 7Q, p. 11] your fabrication plants?

A Yes.

Q Do you also purchase either boxed beef or carcasses from Spencer Beef Division?

A Yes.

Q And you are also aware of the proposed acquisition by Excel of Spencer Beef Division?

A Yes.

* * * *

[Pl. Ex. 81, Def. Ex. 7Q, p. 12]

Q Mr. Minshew, isn't it true the acquisition, the proposed acquisition by Excel of Spencer Beef Division will eliminate one of the 12 to 20 suppliers of carcass or boxed beef which you referred to on direct testimony?

A Yes.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DEPOSITION OF ROBERT D. WEBER
September 22, 1983

PURSUANT TO NOTICE, the deposition of ROBERT D. WEBER was taken on behalf of the Defendants at 36th & Farnam, Omaha, Nebraska at 9:45 a.m., before Carol Patterson, Registered Professional Reporter and Notary Public within Colorado.

[Pl. Ex. 82, Def. Ex. 7P p. 4]

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * * *

ROBERT D. WEBER, having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. EASON:

Q Could you state it [sic] your name and address for the record, and please spell your last name.

A Robert D. Weber, W-e-b-e-r, Dorchester, Nebraska.

Q Mr. Weber, how long have you lived in Dorchester?

A Basically all my life.

Q And how old are you now?

A 41.

Q Mr. Weber, what sort of business are you in?

A I run a feedlot for finishing cattle.

Q And what is the length of time in which you have been in that business?

A Roughly 20 years.

Q What is the size of your business?

A We market 7 to 9,000 a year.

Q And who do you market your cattle to?

A Area packers.

Q Could you be more specific?

[Pl. Ex. 82, Def. Ex. 7P p. 5]

A Monfort, Union, Excel, Iowa beef.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 7]

Q In terms of miles, what is your normal sales area?

A Oh, roughly 100 miles.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 12]

Q (BY MR. EASON) Are you familiar with the prices of fat and feeder cattle over the geographic area east of the Rocky Mountains in the entire United States?

A Yes.

Q Based upon that familiarity, is it your testimony that prices for fat and feeder cattle tend to be uniform throughout that geographic area?

A Yes.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 19]

[CROSS EXAMINATION BY MR. RASTELLO]

Q What percentage of your cattle have you marketed or sold to Excel in the past year?

A Again, I would be speculating to the exact number.

Q What would be your best estimate?

A I would say probably over 50 percent.

Q Have you sold to Spencer Beef in the past year?

A Yes, I believe so, yes; a minor amount, but I have sold to them.

Q Would it be approximately 5 percent?

A I would say it would be no more than that.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 20]

Q (BY MR. RASTELLO) You are simply to answer the question. So it's fair to state that since you sold over 50 percent of your cattle to Excel, they are, by far and away, your largest buyer?

* * * *

A They have been the largest buyer in the past year.

Q (BY MR. RASTELLO) Have you entered into any forward contracts with Excel?

A In the past, yes.

Q Approximately how many?

A I honestly don't recall. It's a minor amount.

Q When you say minor, would you elaborate, please?

A Less than 500 cattle.

Q On how many forward contracts have you entered into with Excel or its predecessors in the past five years?

A I honestly would be guessing.

Q Just give me your best estimate.

A Not more than 10, I don't think.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 30]

Q And yesterday you also told me that you did not care who purchased Spencer Beef Division, so long as they were healthy?

A Yes, I think I made that statement.

Q Is that still true today?

A Yes. I think that would be valid.

Q You are aware that if Excel purchases Spencer Beef, that they intend to open the Schuyler plant?

A Yes, that's—yes.

Q And your feedlot is located in Dorchester, Nebraska?

[Pl. Ex. 82, Def. Ex. 7P p. 31]

A Yes.

Q And how far is that from Schuyler?

A About, roughly 70 miles.

Q And how far is the Excel plant that you are currently selling over 50 percent of your cattle to?

A About 100; a little over 100.

Q So it would be 30 miles less distance?

A That's correct. That's correct.

Q And you also told me yesterday that freight is an important item in selling your cattle because it's the net price you receive that is important to a cattle feder [sic]?

* * * *

A Yes.

Q (BY MR. RASTELLO) Is it true, Mr. Weber, that the further cattle is shipped, the more the transportation costs?

[Pl. Ex. 82, Def. Ex. 7P p. 32]

A Yes.

Q Is it also true that the further cattle is shipped, the greater the shrinkage of the cattle?

A That's a fact, yes.

Q And so with the Schuyler plant being opened, you will probably fair better from the standpoint that you will have less freight and less shrinkage of your cattle by having a plant closer?

A There is that potential.

Q Presently what Excel plant do you ship the 50 percent of your cattle that you sell to Excel?

A Rockport.

Q And that's about 100 miles?

A Yes.

Q Yesterday you explained to me when we were speaking about the pricing structure and the general area of your feedlot an example where Spencer had offered $2 per head lower than the going market price for cattle. Do you recall that example?

A I don't recall that specific example.

Q Let me fill in some of the gaps here. Yesterday you told me that during the past year Spencer, who you portrayed as not being very aggressive in the market, had offered you and other cattle feeders approximately $2 less per head than the going market price and then Excel came around [Pl. Ex. 82, Def. Ex. 7P p. 33] and offered about 50 percent less than the going market and quickly thereafter, Spencer changed its pricing to be 50 percent—excuse me, 50 cents less. Now, does that ring some bells?

A Yes, okay. I think you are referring to our conversation concerning the specifications on a contract purchase program.

Q Yes. Now, would you restate for me the example that I just referred to as it occurred, to the best of your recollection?

A The local buyer or representative for Land O' Lakes—

Q Which is Spencer?

A Right. —has made available, as an option, forward contracts for the purchase of fat cattle. The contracts, as offered to me over the last two or three years I would say, used as a standard basis $2 below the futures option.

Q Okay.

A Excel, when they instituted their program—and incidentally, I did not sell to Spencer under those terms.

Q All right.

A Excel, in introducing—or I shouldn't say in introducing—but in offering their representative and offering their contract program, offered a variable basis from the [Pl. Ex. 82, Def. Ex. 7P p. 34] futures option, generally from 50 cents below to sometimes a premium above, but basically, just to use a general statement, approximately 50 cents under the futures option was common, which obviously put Spencer in a less competitive position in my instance.

Q And how did Spencer respond?

A They ultimately changed their contract.

Q To what?

A To a closer proximity and it varied. It became more variable and more closely approximated what Excel was doing.

Q Now, if the merger between Excel and Spencer is allowed to proceed, isn't it true, Mr. Weber, that the competition between Spencer and Excel, such as the example you just stated, would be eliminated?

* * * *

A Yes.

Q (BY MR. RASTELLO) What percentage of your cattle would you say during the past year you have sold within 100 mile radius of your feedlot?

A Can I qualify the hundred miles to include plus or minus 10?

[Pl. Ex. 82, Def. Ex. 7P p. 35]

Q Yes, 110?

A That's the general, you know.

Q Right.

A 95 percent.

Q You referred earlier to local customs as having a substantial factor on prices and that type of thing. Would you elaborate for me the type of local customs you are referring to?

A Some feeders use a terminal market.

Q Would you describe what a terminal market is, please?

A A central market, such as Omaha, Sioux City, whatever. Other feeders sell directly to packing plants.

Q Located within a hundred-mile radius?

A Whatever. Some feeders sell live weight, FOB the feedyard. Others sell live weight delivered. Some people sell in the beef. Some sell grain yield. There are many, many options.

Q Right, and they vary—the local customs vary from region to region; is that correct?

A Yes.

Q Would you say?

A Yes.

Q Are you aware of the price differentials between the various regions for fed cattle?

[Pl. Ex. 82, Def. Ex. 7P p. 36]

A Within reason, yes.

Q What are some of the factors that affect the differences in price a feeder might receive in this part of the world, east Nebraska, compared to the Southwest?

A Weather.

• • • •

[Pl. Ex. 82, Def. Ex. 7P p. 37]

Q Was there more than one occasion in the past year where you went well beyond the 100 mile radius to sell [Pl. Ex. 82, Def. Ex. 7P p. 38] your cattle because of depressed cattle prices locally?

A I can't recall many others, no. I recounted the one specific example, and it's not common.

Q The reason it's not common is because of the additional freight cost and shrinkage loss that a cattle feeder will suffer in transporting their cattle a greater distance than 100 miles?

A That's one factor, yes.

Q Have you ever sold your cattle to anyone in the State of Illinois?

A I don't recall, no.

Q How about the State of Indiana?

A No.

Q How about Kentucky?

A I have not sold fat cattle there.

Q You haven't sold to very many eastern states, or to eastern packers, have you?

A By eastern packers, meaning?

Q Someone east of Indiana?

A No.

Q Have you sold any cattle to anyone east of Indiana?

A Not that I can recall.

• • • •

[Pl. Ex. 82, Def. Ex. 7P p. 39]

Q (BY MR. RASTELLO) Is your knowledge of feedlots and practices and prices on the eastern part not something that you are intimately familiar with from your personal dealings?

* * * *

A I would say, yes, that's probably true.

* * * *

[Pl. Ex. 82, Def. Ex. 7P p. 43]

Q Now, if the merger between Excel and Spencer is allowed to go through, that will not add another purchaser of your cattle to the marketplace, will it, Mr. Weber?

A By corporate entity, no.

Q Right now you are selling to both Excel and Spencer, albeit to a much lesser scale, to Spencer; is that correct?

A That would be correct.

Q So the merger of Excel and Spencer is going to eliminate one purchaser of your cattle; is that correct?

A Yes.

Q Do you know what the western cornbelt region is?

A Yes, yes.

Q How would you define the western cornbelt region?

A My definition of it—and I may be, from the official designation may be off a little—but I would include western Iowa, on to east of the Rockies and north of central Kansas.

Q Is this considered a significant area of fed cattle production?

A Yes.

* * * *

[Def. Ex. 7W p. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

DEPOSITION OF KENNETH MONFORT
September 21, 1983

• • • •

EXAMINATION

BY MR. HANLEY:

Q Would you state your full name, please, sir, and spell your last name.

A Kenneth Monfort, M-o-n-f-o-r-t.

Q Where did [sic] do you live, Mr. Monfort?

A I live in Greeley, Colorado.

Q What is your address?

A 1357 43rd Avenue, No. 29.

Q By what company are you employed?

A Monfort of Colorado.

Q What is your present position with Monfort of Colorado, Inc.?

A President and chief executive officer.

Q Mr. Monfort, are you a graduate of any [Def. Ex. 7W p. 5] university or college?

A No.

Q Was Warren H. Monfort your father?

A Yes.

Q He is deceased?

A Yes.

Q When did you first take a position with Monfort of Colorado or its predecessor company?

A Well, it was basically a family-type operation, so I really started working there as a kid; but I guess full time, basically when I quit college after my junior year, which would have been 1950.

Q What college were you attending?

A Colorado State University.

Q And what was your area of specialty? What was your special area of interest?

A Animal nutrition and biochemistry.

Q And you went to work for Monfort right after you left college?

A Yes.

Q You haven't had employment with any other company?

A No.

Q What was the title of your first position with Monfort?

[Def. Ex. 7W p. 6]

A At that time it was still a family-type operation and really wasn't a title. I guess my first title probably was when we did start the packing company, and I was president of that.

Q When was that?

A That was in 1960.

Q Just to save us time, I wonder if you would sketch for us your employment history with Monfort. Would you tell us—and I recognize that this is a long period of time—

A Sure.

Q —we are asking you to—I'm only asking you for the best of your recollection—

A Yes, it is a long period of time. Basically—

A —of each position you held with Monfort or its predecessor company; the date, to the best of your recollection, that you held each position and a brief description of the job.

A Okay. Well, basically, I will go back prior to college, then. When I was growing up, why, what is now the company was, as I say, a farm. I did farm work. My dad started feeding cattle. I helped feed cattle. By the time I was in college, why, I would periodically buy cattle at auction markets, feed cattle, check cattle for sick ones. Just normal type things in that sort of operation.

After I got out of college, why, I didn't get [Def. Ex. 7W p. 7] much advancement since I hadn't had a degree, I guess, but it was still a small operation. I checked for sick cattle; did more and more cattle buying—feeder cattle buying.

In the late 1950's when we decided there should be a packing plant built in Greeley, Colorado, we tried to get someone to build a plant there. We ended up going in partnership with a Denver packer; a packing plant was built. At that time I pretty much switched where 80 percent of my time was spent in the packing operation.

At that time, as I say, I think I became president of the Monfort Packing Company. It had had about a year

of another name. Called it Greeley Capital Pack. We did such a lousy job of starting the plant up, that we got to buy our partner out, and that's when it became Monfort Packing Company and was totally owned by members of the family.

Continued to run it and spend some time at the feedlots and, in general, worked with my father at that time until about 1969. 1970, why, we put all the—1969—late 1969 we put together, I think, three corporations which were Monfort Feedlots, Monfort Packing Company. By that time, we had acquired Mapelli Brothers, which was a Denver purveyor. Put those three together under the name of Monfort of Colorado.

I was president of that, and my father was chairman of the board. The company went public in January of 1970, I believe. I was president and basically chief [Def. Ex. 7W p. 8] executive officer until about 1975. In 1975, why, I basically was tired of some of the things that I was doing and wanted to run divisions and still look at computer reports, et cetera. So we made Sam Addoms president and chief executive officer. I was called a senior vice-president in charge of the feeding and packing parts of the company and served in that capacity for about four to five years, at which time in 1980, why, I resumed the job of president and chief executive officer. And I have the normal job that would entail.

Q Would it be accurate to say, Mr. Monfort, that you have had substantial experience in every aspect of the cattle business?

A I'm not an expert on ranching, but I have had a lot of experience in a lot of aspects of it.

Q You certainly have had experience in feedlots and feeding; correct?

A Yes.

Q And you have had experience in buying cattle?

A Oh, yes.

Q And you have had experience in the fabrication processing of cattle?

A Basically in the management position, yes.

Q And also selling, I take it?

A Yes.

Q Is there anything else? What have I left out?

[Def. Ex. 7W p. 9]

A Raising cows and calves.

Q Raising cows?

A I have been on a lot of ranches, but I'm surely not an expert there.

Q As you said, originally Monfort of Colorado or its predecessor, whatever it was called, was a family cattle feeding business?

A Yes.

* * * *

[Def. Ex. 7W p. 12]

Q (BY MR. HANLEY) Let me call your attention to the document that is in front of you, Defendants' Exhibit MM, the first page where you have read before. Calling your attention to the last sentence of the second paragraph, "The Company also purchases cattle which meet Monfort specifications from independent feeders throughout Colorado, Nebraska and other Great Plains states."

I would ask you first, sir, if that statement is [Def. Ex. 7W p. 13] accurate; and second, with reference to Mr. McClearn's statement, if you could tell us what the other

Great Plains states are that were included in that statement.

A Okay. Yes, it's true that we buy cattle in Colorado and Nebraska. We will once in a while buy cattle in Kansas; probably buy cattle that originate in Iowa and Minnesota through the Sioux City or Omaha market, although we do not have buyers in those states. We will buy cattle from southern South Dakota fairly normally. With big distortions in the market, why, you might go further, but seldom.

Q Your company also operates a beef processing plant in Jacksonville, Florida?

A Basically, it's a ground beef plant in Jacksonville.

Q Could you describe that operation just briefly for us?

A Yes. It's an operation where we ship trimmings from our plant or buy trimmings from other packers to that plant. We will buy either imported meat or domestic cow meat to mix with those trimmings, grind it into hamburger and basically sell hamburger patties.

Q Just for the record, what do you include within the phrase "trimmings"?

A Trimmings basically are the—I guess the easiest way to call it would be the by-product of boxed beef. It's [Def. Ex. 7W p. 14] the—when you trim a loin into its component parts, strips, tenderloins, top sirloin, flap triangles and ball tips, why, there is lots of trimmings; and that trimmings we either sell to other sausage and hamburger people or use ourselves.

Q Monfort operates two beef packing and fabricating plants located in Greeley, Colorado, and Grand Island, Nebraska, as of today; is that right?

A Yes. The last thing I knew, they did.

Q Is it accurate to say that annual sales of Monfort's combined operations exceed $1 billion dollars annually?

A Currently, yes.

Q For how many years have annual sales of Monfort combined operations exceeded $1 billion dollars?

A Our year ended September 2, 1983, this year. This will be our first fiscal year that we have exceeded the billion dollar sales.

Q Just to get some basics down, under your hat and experience as a cattle feeder, is it accurate to say that the Monfort feeding program begins with a staff of cattle buyers who purchase feeder steers directly from ranchers, farmers, and auction markets throughout the western United States?

A Yes.

* * * *

[Def. Ex. 7W p. 20]

Q Just because my question was a little imprecise, [Def. Ex. 7W p. 21] let me ask you if your knowledge with respect to these rankings increased since the filing of this complaint?

A No. It is, of course, a changing world; and if we take Schuyler's production out, why, I presume that others would pass Spencer; but everyone has assumed that Schuyler would operate again. So I never took that production out of Spencer's figures.

Q You have assumed that Schuyler would reopen?

A Oh, yes.

Q You say "everyone," meaning everyone in the industry believes that, to your knowledge?

A Yes.

Q On what do you base that?

A Well, it's a modern plant and a good location, had a trained work force, and I think everyone in the industry believes that it will operate again.

[Def. Ex. 7W p. 30]

Q (BY MR. HANLEY) What is the present state of construction at Grand Island? Is it completed?

A About 90 percent.

Q The project estimated in 1982, according to your 10-K for the fiscal year ending August 28, 1982, was estimated to cost a total of $6.5 million. What are the present estimates of the total cost of the construction?

[Def. Ex. 7W p. 31]

A We added somewhat to the project. So I think it's about an $8 million project.

Q The project at Grand Island was estimated in the 1982 10-K to add 70,000 square feet to the then-current 220,000 square foot plant, and to increase daily production capacity by 15 percent to 3700 head of cattle at the plant. Have those estimates proven to be accurate?

A Yes.

Q So tell me how many square feet has the project added to the plant, or will, when the other 5 percent is completed.

A The changes that would have raised the 6 and a half to $8 million dollars were not square footage changes, and I presume the 70,000 square feet is accurate.

Q Can you tell us just generally what those changes were?

A Basically, yes. We bought that plant in 1979 and built a modern fabricating facility on what was a slaughter

plant. Then this change basically has been to go back into the slaughter part of the plant and modernize it to—It was an old plant. We modernized it to where we think it's relatively efficient now.

Q Just generally, how much has the project increased daily production capacity, or will?

A I think the 15 percent is about accurate. From [Def. Ex. 7W p. 32] about 32 to 3300 per day up to 37, 3800 per day on the slaughter.

Q Is it accurate to state that Monfort of Colorado, and its divisions and subsidiaries are engaged in a single vertically integrated line of business, namely, the production and sale of beef and lamb products?

A That's pretty accurate, yes.

Q In Monfort of Colorado's Form 10-K filed with the SEC for the fiscal year ending August 28, 1982, previously marked Plaintiff's Exhibit 2, on page 7, where the stamp is 010 00007, you state, "As of the fiscal 1982 year end, Monfort and two other packers ranked as the third largest beef packers based on the number of heads slaughtered. During the 1982 fiscal year the company slaughtered approximately 3 percent of all domestically produced beef (up from 2.5 from fiscal 1981) and approximately 12 percent of all domestic lambs slaughtered (up from 10 percent for the fiscal 1981)."

Let me ask you first, who are the other two packers ranked as the third largest beef packers?

A Well, I think at that time we thought we were close to the same size as Spencer and SIPCO, which is Swift, would be approximately the same size.

Q You have since changed your mind?

A Well, no, I don't think I changed my mind.

Q Would your answer be the same as of August 1983?

[Def. Ex. 7W p. 33]

A Well, it depends upon whether you count the Schuyler plant as part of Spencer's production or not.

Q And if you don't?

A If you don't, why, we would be larger than Spencer.

Q What companies were first and second?

A IBP and MBP, Excel or Excel—I don't whether the name changes occurred.

Q And, again, what was the source of that information?

A Industry knowledge.

Q I would like to talk with you for a minute about the relevant markets that are defined in the complaint. So moving back to the complaint, paragraph 34 B—if I have got the right one—referring to paragraph 34 B on page 7 of the complaint, do you have that in front of you?

A Yes, sir.

Q Monfort alleges that "the acquisition of Spencer Beef Division by defendants violates Section VII of the Clayton Act because the effects of the proposed acquisition may be substantially less in competition or create a monopoly because, in addition to elimination of actual and potential competition between Spencer Beef and defendants in the procurement of fed cattle, the acquisition will make defendants a dominant purchaser of fed cattle and defendants [Def. Ex. 7W p. 34] will have the incentive and ability to use their increased power to foreclose or impair competition in the market."

My question, sir, is: I wonder if you would tell me exactly how the acquisition of Spencer by Excel will provide defendants with the incentive and ability to foreclose, impair, or curtail competition in the market for fed cattle?

A Basically, it will—it would make Excel and IBP about the same size in that particular market of purchasing fed cattle. Depending on how the market is defined geographically, Excel would be probably the largest purchaser of fed cattle; but between the two of them, they would be purchasing a percentage of the fed cattle that I think clearly would say that the two are dominant and would allow them to price product, purchase cattle with margins that could force other people out of the business.

Q Well, is it your contention that Excel's acquisition of Spencer will increase the likelihood that firms engaged in the purchase of fed cattle in the High Plains northern cornbelt area will be able to and will, through express or tacit collusion, depress the price they pay for fed cattle to below competitive levels?

A The word "collusion" bothers me. I have never suggested anyone was colluding. I think the size of their market share would be such that the two of them, not operating in unison but with the same purposes in mind, could dominate [Def. Ex. 7W p. 35] that market; could, for a short period of time, probably even raise the price of fed cattle over that which it would be in a competitive situation; and after others were forced out of the business, then they could lower their buying prices and, in effect, increase their margins.

Q I'm not quite clear. How would Excel/Spencer, after the acquisition, be able to accomplish depressing the price they pay for fed cattle below competitive levels?

A Only after they got other people out of the business.

Q How would they do that?

A By concentrating on market share; both they and IBP would be relatively the same size. Neither one are noted for wanting to be second. They work at market share, thereby cutting their margins, other people's margins to an extent where other people, without the re-

sources that those two companies have, are forced out of the business.

Q Just so I understand, you are not contending, are you, Mr. Monfort, that IBP and Excel would enter into some kind of collusive agreement to depress the price?

A No. That, of course, obviously is possible, but I surely would not contend such a thing.

Q And on the basis of past historical performance, would you say the chances of that are fairly unlikely?

A I think the chances of that are very unlikely, [Def. Ex. 7W p. 36] and that the danger comes with them from competing with each other far more than colluding with each other.

Q You would anticipate that they will continue to compete for the number one spot?

A Yes.

Q I'm sorry?

A Yes.

Q If we were to concede, Mr. Monfort—and we don't for a minute—that Excel/Spencer and others wanted to engage in some kind of collusive uncompetitive pricing of fed cattle and to depress the price of market of cattle in the market, how many firms would they have to have to go along with them to make that plan economically successful?

A None.

Q They could do it themselves?

A Yes, sir.

Q And I understand that you contend that the acquisition of Spencer by Monfort might allow—

A By Excel.

Q I'm sorry; Spencer by Excel. —might allow the market leaders to bid the prices of fed cattle above competitive levels in order to drive less well-financed rivals out of the market?

A Yes.

* * * *

[Def. Ex. 7W p. 37]

Q I'm sorry. Then, let me interrupt for a second because I think we are not communicating. What I was asking for before was any historical examples that you know of where, through market dominance, major firms have increased the price and thereby eliminated competition from the market by driving companies out of the market.

A Well, let me try and explain.

Q Okay.

A I think we are communicating.

Q Okay. Good enough.

A As new plants with new costs based on different labor rates, whatever, have been built, the margins necessary [Def. Ex. 7W p. 38] for a plant to survive have changed. So what may be your reasonable operating cost and what you can pay for cattle may be reasonable to you, it may be the same price that drives someone else out of business.

Q I guess I just don't follow that from a logical standpoint and maybe you can explain it to me. I'm sure you can.

You are saying that new entrants may have a cost floor that is higher than the old entrants?

A No. I certainly don't think I said that.

Q Okay. Then, it's lower—the new entrant would, by being more efficient, would have a lower cost base?

A I said over the past 20 years as more modern plants were built and more competitive labor rates, better business people running the plants, many of the newer plants had lower costs than other plants, and the other plants were driven out of the business.

Q As a direct result of the efficiencies of the new entrants?

A Yes, sir.

* * * *

[Def. Ex. 7W p. 39]

Q (BY MR. HANLEY) If we can hypothesize for a minute, do you contend that it is conceivable, after this acquisition, for Excel and IBP to operate in such a way that they drive the pr[illegible] of fed beef up to a point where smaller companies coul[illegible] not compete and would be forced to leave the market?

A Yes. And rather than price, you know, it's important that, I think, we talk about margins because price is a factor that switches with supply. What I'm really talking about is, if the price level would have stayed steady, and the price level of fed cattle goes up, the beef price goes down, the boxed beef price goes down, et cetera, that margins can be squeezed to accomplish what you said, yes.

Q Maybe we better just have for the record what you mean by "margins."

A Well, margins, basically—in my terminology, a packer has a cost to slaughter and process boxed beef. Everyone's costs are different, but the margin that I talk about is the difference in the buying price—buying costs of the fed cattle versus the sales of all the component parts. So that is the margin I would talk about.

Q And your concern that Excel and IBP might go [Def. Ex. 7W p. 40] about obtaining prices in the market which would reduce that margin to the point where inefficient operators would not be able to stay in the market?

A Not only inefficient ones, but those without the resources that IBP and Excel have.

Q Tell me, how could you envision how Excel and IBP could go about getting that decrease in the margin? How would they do it in the market in which you work every day?

A Well, they could become aggressive for buying cattle. They could operate— Instead of 40 hours, they could operate 48 hours a week, working for market share.

Q Now, we are talking about increasing the price of this—

A Yes.

Q —scheme, or whatever we want to call it, this device?

A Just happening. I don't think it has to be a scheme or a device. You have two very large companies who would be vying for No. 1 in the business, fighting for volume, buying cattle aggressively, selling boxed beef aggressively. Buying aggressively means you are paying more than maybe you should. Selling means maybe you are taking less than you should and thereby squeeze margins.

Q And they do that for the purpose of driving competition out?

[Def. Ex. 7W p. 41]

A They do that for the purpose of increasing their market share, and the result is driving competition out.

* * * *

Q (BY MR. HANLEY) Do you think, Mr. Monfort, that there is really a serious possibility that the market leaders in your market would be apt to bid the price of fed cattle above competitive levels?

A In their search for market share, yes.

Q Would that be for a relatively short period of time?

A Basically until they squeezed some of their competition from the business. Obviously, at some point in time they would like to, after things shook out, why, they would like to increase their margins rather than tighten them.

Q No matter how big you are, you can't keep paying above competitive levels in the market and stay in that market very long, can you?

A No, but companies, for strategic purposes, can very well work on market share and forego profits for a while to establish that market share.

[Def. Ex. 7W p. 42]

Q Well, just so we understand each other, this strategy would only make sense if the leaders would be able to drive competitors out of the market and then recoup the costs of the program in the period following the competitors withdrawing from the market?

A Yes, that's true. Again, I don't like the term "program" because I think it's a happening, not necessarily anyone's design.

Q But in any event, the ability to recoup the cost of such a program would depend, in large measure, on the number and relative size of the competitors and on entry conditions into the market, correct?

A Yes, sir.

Q Not to take this to a distracting level, but just in the name of clarity, if there were present in the market a number of companies which could survive high cattle costs and a number of potential competitors waiting to come into the market, you, as a cattle buyer, would not put together any kind of plan to drive the price of cattle up above a competitive level, would you?

A Well, you might—theoretically, you could do the market share bit, strive for market share; theoretically, the "program," as you call it, could fail, yes; but that would depend on the strength, as you say, of the competition and the chances of entry into the business.

[Def. Ex. 7W p. 43]

Q If this plan failed, it would be a pretty expensive failure, wouldn't it?

A Well, it would be expensive for me. What it would be for Cargill, I don't know.

Q Let me ask you, you are a knowledgeable cattle buyer, would any knowledgeable cattle buyer enter into a plan to raise the price of cattle if there were 10 companies which could survive high cattle prices for six months, and if there were a number of potential cattle buyers waiting to enter the market?

A Well, "cattle buyer," in my terminology, is someone that operates on orders from management of the company. So the management of the company would be the one that would decide on how aggressive they should be in buying cattle.

Q I'm sorry. When I used the word of "cattle buyer," I didn't mean the term of art, the man that was out on the field buying. I meant a company which was buying cattle.

A Okay.

Q With that definition, would you answer the question?

A Well, I could foresee, and do foresee, if this merger goes through, that the two dominant forces, as I define them, would aggressively compete for market share, would operate their plants at maximum capacity to get that market share; and the result of that would be that cattle prices for [Def. Ex. 7W p. 44] the short term—and I don't know whether I'm talking six months or two years—would be driven up higher than they would have been if that sort of activity was not going on.

Q What is so important about market share? Why is that so important?

A Well, I think to some, it's important from a pride standpoint; but I think, also, when you get into the sales of boxed beef, that market share becomes important in today's merchandising; and, I think, as we get into different merchandising in the future, it will become more important. I guess that's it.

Q Is it related in any way—I'm just trying to understand—is it related in any way to profit?

A Market share?

Q Yes.

A Obviously, if—ours is a low-profit industry. We— All of the successful companies run on a 1 to 2 percent profit margin, which all of us in the industry think is too low. If the industry were not so competitive, those that remain probably could increase that profit margin. If market share helps them to reduce competition, obviously it relates to profits.

Q But in order to raise the profits by the survivors, there would have to be collusion, wouldn't there?

A No.

[Def. Ex. 7W p. 45]

Q Just so we have the numbers in mind, let me ask again: Would any knowledgeable cattle-buying company enter into a plan to raise the price of cattle if there were 10 companies which could survive high cattle prices for a period of six months and if there were a number of potential cattle buying companies waiting to enter the market?

A I think that's all hypothetical. I don't think it really fits the circumstance. I don't think 10 are there; I don't think that six months is necessarily the right time frame.

Q Too much—

A I think it's a hypothetical question.

Q It's unrealistic in terms of today's market?

A In the exact way you put it, I would say that would probably be unrealistic.

Q Because I limited it to 10?

A Not impossible.

Q I limited it to 10; I used the number 10—

A You used 10 and six months, which I think the process would take longer than six months; and I don't think there is 10 healthy competitors out there.

Q How many healthy competitors are there in the beef market now?

A I don't know. We are healthy today. A year from now we could be very unhealthy if circumstances accrued [Def. Ex. 7W p. 46] which I think they could accrue.

Q That is true with any of your competitors, is it not?

A True.

Q How many would you say are healthy competitors in the market today?

A Under today's circumstance, healthy competitors? These would be healthy competitors to IBP and Excel/Spencer, ourselves, SIPCO, Idlewild. For peculiar reasons, Val-Agra. I think that would be my list.

Q What period of time? You said six months wasn't long enough?

A Well, I think the process could take two or three years.

Q Well, then let me ask you, using your figures, would any knowledgeable cattle-buying company enter into a scheme or a plan to raise the price of cattle if there were four healthy companies which could survive high cattle prices for a period of two years, and if there were a number of potential cattle-buying companies waiting to enter the market?

A You keep using cattle-buying companies.

Q Let's use—

A Talking about packers?

A We are talking about meat packer.

Q Fine.

* * * *

[Def. Ex. 7W p. 47]

Q So that you might be willing yourself in order to get market power; and if you were in a position to do so, you might decide to aggressively purchase beef at above competitive market levels for a period of two years with the thought that after that two-year period, there would be fewer competitors in the market?

A What happens is, you don't go out and aggressively purchase beef to chase competitors out. You—there is a given number of cattle that are available. With [Def. Ex. 7W p. 48] the given number of cattle available, and if your current market share of the boxed beef business is 35 percent, and you want to raise it to 40 percent, you run your plants overtime, you buy cattle in order to run them overtime. This, in fact, raises the price level from what it would have been. And the by-product of that, not necessarily the primary product, is you run other people out of the business.

Q Okay. I haven't been in the beef business very long, so you will have to forgive me. You say there is a finite number of cattle out there to be bought; is that correct?

A Yes.

Q If the dominant buyers in the market take a substantial number of that finite number of cattle, doesn't that automatically depress the market value of the cattle, or does it increase—

A Well, it would increase.

Q Because the supply has been diminished?

A Well, the supply— If the supply is static and you increase your numbers needed—and I try and stay in business with my numbers needed—why, we have to bid against each other for those cattle. So the effect is, we do raise the price, at least as long as I'm still there in business.

* * * *

[Def. Ex. 7W p. 49]

Q You said, in part, that the market dominance could be employed to increase the procurement price of grain-fed steers and heifers while depressing packer boxed beef prices. You said, "The resulting price cost squeeze could

severely injure the smaller competitors of IBP and Excel, including Monfort."

[Def. Ex. 7W p. 50]

Then, if you will turn to your answer to interrogatory No. 20 of defendants' second set of interrogatories, with reference to your answer to interrogatory 9 of defendants' first set of interrogatories, we asked you whether you knew of any instances in which a price cost squeeze of the sort referred to in your answer to interrogatory No. 9 has taken place in any part of the beef industry in the last 20 years; and, if so, to state the basis of your contention.

You replied in your answer, "The price cost squeeze referred to in the answer to interrogatory 9, first set, has existed throughout the industry for the last 20 years. Monfort believes that pricing practices of that sort have contributed significantly to the failure of a number of beef packers in recent years." That was your answer under oath; is that correct?

A Yes.

Q By "price squeeze," did you mean a narrowing of the margin or profit in each market?

A A narrowing of the margin or profit between the two markets, yes.

Q And these profit-narrowing results have been the result of competition?

A Yes, sir.

Q I'm sure you could take the rest of the day and [Def. Ex. 7W p. 51] answer my next question, but I would ask just briefly, would you describe for me the major changes in the beef industry and the packing industry in the last 20 years.

A Basically, the last 20 years has seen the entrant—entrance of what some people have called the new breed beef packers, which included IBP, Excel, or Excel's ancestors, Spencer, ourselves, a number of new companies who basically took the marketplace away from the old line packers: Swift, Armour, Wilson, Cudahay, et cetera. This basically occurred for two reasons: The first reason was that the old line packers did not build new, modern plants in locations where the cattle were being fed after World War II, and this allowed people like ourselves and the others to get into the business.

The other basic change—maybe there is three reasons. The other basic change has been in labor rates from a, quote, master agreement-type union agreement where all packers were, in essence, paying the same rates to one where there were highly differentiated rates, either negotiated or that arose after strikes.

The third was the fact that some of these same new packers took the steps to go into the boxed beef business rather than stay in the carcass shipping business and merchandise their product totally differently.

* * * *

[Def. Ex. 7W p. 52]

Q Do I understand, then, that this new breed of entrants into the market by efficiencies and production basically took away the market from the old line beef producers?

A Yes. Basically, it was location of new plants to begin with, and then labor and merchandising afterwards.

Q By your answer to our interrogatory No. 21, second set, you admit that you do not contend that any relevant market you have identified for the purpose of this case is

currently functioning in a noncompetitive fashion; is that correct?

A Yes, sir.

Q So this price squeeze that has been going on for 20 years has been competitive, not noncompetitive?

A Yes.

Q It has not been predatory?

A No. There are those that went out of business that probably thought it was. I don't happen to think it was.

Q Well, in any event, inefficient producers have been squeezed out by the more efficient producers, correct?

A Yes.

Q And Monfort has been one of the new breed and [Def. Ex. 7W p. 53] one of the surviving efficient meat producers?

A (Knocks on the desk.) Yes. I guess you can't type my knock on wood.

Q From Monfort's answer to the plaintiff's first set of interrogatories numbered 1 and 2—the first set 1 and 2—it appears that Monfort contends that grain-fed steers and heifers effected to yield USDA "good," or better with certain yields is the relevant product market on the buying side of this case; is that correct?

That's a little convoluted. Would you like to have the reporter read it?

A Yes, that's basically correct.

Q That's correct?

How did you arrive at that definition of the relevant market, Mr. Monfort?

A Basically, it's the market that all of the major beef packers are in, and the market that fits the boxed beef

concept of the industry, fits the specifications of our buyers, whether they be chain stores, voluntary retailers, or hotel/restaurant institution people.

Q Would you agree that the goal of market definition in these cases is to identify and consider all the firms that would have to cooperate in order to raise prices above competitive levels and keep them there?

A No.

* * * *

[Def. Ex. 7W p. 54]

Q (BY MR. HANLEY) Who were you trying to include within this market definition?

A Basically the beef business that we are in, that [Def. Ex. 7W p. 55] Excel is in, Spencer is in, that IBP is in; the business that I am in, and those that I compete with are in.

Q But you only included within that relevant market those firms that now purchase these steers and heifers expected to yield USDA good or better with certain yields; is that correct?

A Yes, because that's the business I think we are all in.

Q Well, you are in other businesses, aren't you?

A Not—support businesses to that basic business.

Q Well, you buy and sell—you buy, fabricate, and sell other than steers and heifers expected to yield USDA good or better with certain yields, don't you?

A Not knowingly.

Q You don't buy cows or steers?

A Well, steers, yes. Cows or bulls, you meant?

Q Cows or bulls, I mean.

A No, we don't buy cows.

Q So the only beef that you buy are fed steers and heifers expected to yield USDA good or better with certain yields?

A Yes.

Q Let me ask you this. From the seller's standpoint, the seller of grain-fed steers and heifers expected to yield USDA good or better standpoint, isn't it [Def. Ex. 7W p. 56] accurate to say, Mr. Monfort, that any purchaser able or willing to purchase cattle for slaughter is a perfectly acceptable substitute from the seller's standpoint for present buyers?

A Sure. I would assume that a stockbroker is a substitute, if he will pay for the cattle.

Q Okay. Is it true, Mr. Monfort, that any successful attempt by fed cattle producers to depress the purchase prices of cattle might attract into the cattle-slaughtering business firms that now slaughter other animals, such as cows, bulls, pork and lamb?

A I'm going to need the first part of that read back.

(The last question was read back.)

MR. PALMER: Purchasers, not producers.

Q (BY MR. HANLEY) Purchasers.

* * * *

[Def. Ex. 7W p. 57]

A Well, pork and lamb, you can't slaughter cattle in a pork and lamb plant. It's questionable— There are few cow and bull plants where you could efficiently slaughter fed cattle. There are a few in the dairy area where they

will do some switching from fed cattle to cows, but, in general, the plants don't fit the marketing know-how, the cattle-buying know-how. Nothing fits between those two segments of the industry.

Q Again, just to educate me, these purchasers of cows and bulls—let's take them first—they could convert their plants to handle—

A Fed cattle.

Q —fed cattle? Thank you.

A They could in a period of time, but most of—most cow and bull plants are small plants; many of them are old plants that used to be used for fed cattle. I, frankly, don't know of any of them that could be converted to fed cattle plants at where their costs could be competitive with those of us that are already in the industry.

Q What are the major differences in the two plants, the plants that the cow and bull fabricators use and those that the fed-cattle people use?

A Well, size is normally a difference. The rail height of a cow plant would be different than the rail height of a fed-cattle plant normally. Again, with the exception of [Def. Ex. 7W p. 58] some of those plants up in the Wisconsin area. A cow and bull plant normally operates, more or less, seasonally, fairly large numbers at one time of the year, not large at the other time of the year. They aren't the modern, efficient plants that we in the industry now associate with fed cattle slaughters.

Q There are, however, plants that slaughter both fed cattle and cows and bulls, aren't there?

A Yes, there are several. As I say, primarily up in the dairy area. A dairy cow is relatively the same size as an fed steer or heifer, which is different than the normal beef-type cow, which is considerably larger—smaller.

Q What do you contend to be the relevant geographic market on the buyer side of this case to be—the beef buyer side?

A What do I contend?

Q Yes, sir.

A I guess—I guess I can argue that it is six or seven states. I guess I can argue it's within 100 miles of each plant. On the procurement side it varies, depending on what you basically are arguing.

Q We have to come back at it another way. What are the factors or the basis that you use to determine these relevant markets—geographic markets?

A On the procurement side?

[Def. Ex. 7W p. 59]

Q Yes.

A Most of the feed cattle that are produced or produced in five states, Texas, Kansas, Iowa, Nebraska, Colorado, right offhand, I don't know the percentage of the fed cattle that are produced there, but it's easily found. That is the basic production plant of the fed cattle industry in those five states. So on an overall market, you can argue that.

On the other hand, if you are arguing or discussing the economics of the business and of particular plants, then the factors of the freight cost it takes to move cattle, for instance, from Texas to Nebraska or vice versa, become very significant in our business, which I say is a 1 or 2 percent profit margin business. Normally, the packer pays that freight cost, whether or not he buys the cattle delivered because the feeder is interested in what he is going to get at his feedlot.

So the further that the cattle are transported, the less likely you are to buy those cattle. So most packers

concentrate their buying within 100 mile, up to 150 mile radius of their plant.

Q Is it fair to say primarily because of transportation costs?

A Transportation costs, primarily. In addition, why, you get some minor things: Shrinkage of cattle, bruising [Def. Ex. 7W p. 60] of cattle. Just a matter of where you have cattle buyers located.

Q I [sic] can you tell me why the relevant geographic market for fed cattle should not include all of the northern cornbelt High Plains area of this country and to anticipate your objection, I would define the northern cornbelt High Plains area of the country to include the 12-state region, including the states of South Dakota, Minnesota, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Texas, New Mexico, and Colorado.

A Well, they theoretically could be a market area. If you are talking about plants where our Grand Island plant is located and where the acquisition plants are located, I would think very, very few cattle from Wisconsin would ever get there. New Mexico and Texas would—it would be very abnormal for cattle to be shipped into that area from there. Kansas, only the northern fringe would be normally accessible to that market. Colorado, there is enough packers in Colorado to take care of Colorado's cattle, so it's abnormal when any of them ship into that area. So you can define an area, but whether cattle ever move that way is questionable.

Illinois—was Illinois in your—

Q Yes.

A Illinois, there is enough packers in Illinois and eastern Iowa to handle those cattle normally. So cattle [Def. Ex. 7W p. 61] can move further than this 150 miles or so, but it's an abnormal situation when they did.

If this was not true, why, Excel would basically have no need or desire to buy plants in the north. They could just simply move the cattle down to their existing plants in the south.

* * * *

[Def. Ex. 7W p. 63]

Q Sure. I think maybe you have answered this question with reference to transportation, but I want to be sure. If the purchases of fed cattle within the geographic market that you have described attempted to lower the price of fed cattle, what would prevent sellers from sending their cattle out of the area to slaughters in adjacent areas?

A Well, there again, you don't have to even use the word "attempt." Just say that there is too many cattle in a certain area for the normal buying in that area.

Q Okay.

A Cattle get cheap in that area. Buyers from other areas will come in if they are cheap enough to cover the freight costs into their area.

Q Well, if that's true, then isn't it true that the purchasing market for fed or feeder cattle must include all slaughters east of the Rocky Mountains?

A No, I don't think that's true. I can't—you know, cattle feed in Lancaster, Pennsylvania, would never be cheap enough to bring to Greeley, Colorado.

Q And that's because of the direct shipping expense and shrinkage, primarily?

A Basically because of that, yes.

Q Mr. Monfort, maybe I am misinformed and you can straighten me out. Isn't it true that direct shipping expense and shrinkage are not a direct function of distance?

[Def. Ex. 7W p. 64]

A Well, they equate pretty well with distance. Obviously, the industry is complicated. Sometimes you may get a backhaul truck cheaper than you would get a normal rate truck, so all of that goes into it. But the further you ship cattle, the more it is going to cost, on the average.

Q Just hang in there with me for a minute and straighten me out. Isn't it true that you lose most of your cattle weight and incur most of your bruising, shrinkage, and other problems to the cattle in the loading and unloading operation?

A Probably in the first 10, 15 miles you will, which may equate to loading and unloading.

Q Okay.

A You probably get most of the shrinkage you will get in the first 100 miles. But if you ship cattle 500 miles or, for instance, as we talked before, when our cattle were shipped to California because our plant was shut down and because California had a shortage of cattle at that particular time, the shrinkage would amount to 3 or 4 percent more than they would going from our feedlots to our plant. So—

* * * *

[Def. Ex. 7W p. 65]

Q (BY MR. HANLEY) Did you finish your answer? I'm sorry, I didn't mean to interrupt you.

A I'm just saying that the bulk of it occurs in the first short trucking segment, but it continues to occur every mile.

Q Would you agree, Mr. Monfort, in the last 10 years that trucks that carry cattle have improved significantly from a shipper's standpoint?

A Yes, yes.

Q And you would certainly agree that the highways over which cattle are transported have improved in the last 10 years?

A I think that's more debatable.

Q Other than Colorado, I mean.

A Probably it's true. I guess we just passed a tax to improve them more, so I think there has been some deterioration, but they are probably better than they were 10 years ago.

Q Is it true that a truck driver in a modern, well-equipped rig, driving 40 to 50 miles an hour, over modern highways without frequent stops can drive those cattle significant distances without adding to the shrinkage occurring during the first 15 or 25 miles?

A As I said before, no that is not true, to the [Def. Ex. 7W p. 66] best of my knowledge.

Q Do you have any empirical data; do you have any experience?

A I have seen studies of that, you know, and I know that the curve starts out very high and diminishes, but I don't think it goes to nothing, like your question implied.

Q Okay.

A And I know that cattle that we have shipped to Grand Island from our Greeley feedlots do not yield as well as cattle that are slaughtered in Greeley. Therefore, we are to believe that there is, in fact, some tissue shrinkage involved.

Q By "yield as well," you mean you don't get as many dollars per pound out of those cattle?

A No, you have less pounds of carcass after the slaughter operation.

Q Considering your own feeding operation experience, isn't it true that feeder cattle are now being transported from Kentucky and other places in the south out here to the west?

A Yes. We don't happen to get cattle from Kentucky. Feeder cattle, unlike fed cattle, involve a lot of seasonality in the business. For instance, in—this may be more than you want to know about it—but in April, May, and June—May and June, particularly—if you are to put cattle on feed, you basically have to go to south Texas or to California [Def. Ex. 7W p. 67] to get feeder cattle. Everyone basically has to. At this time of the year we are getting most of our feeder cattle out of areas north of us, Wyoming, Montana, Idaho, or Oregon, but for 10 months out of the year we won't get any cattle out of there. So it's not like the packing business or the fat cattle business where you have large supplies in an area year-round. Every feedlot has to bring them in from lots of distance and, of course, the economics of that is that it is cheaper to support—to transport feeder cattle to the areas where there is feed available than it is to transport the feed to where the feeder cattle are available.

Q Is there anything particular about cattle that are ready for slaughter and feeder cattle, cattle that are to be fed, that impacts on the distance over which those fed cattle can be transported for slaughter? Strike "for slaughter." I think that makes it unclear.

A Well, a bruise on fed cattle is an economic loss. A bruise on feeder cattle, because it's going to be in the feedlot 130 or 140 days will disappear by the time that cattle is slaughtered. So the bruising is not a factor.

The shrinkage is probably less of a factor because you have 120 to 140 days for that animal to gain back any

tissue shrinkage it has suffered in that shipment, and they tend to do that.

Q With respect to bruising, is it inaccurate to [Def. Ex. 7W p. 68] say that most of that bruising occurs either in the loading or unloading operation?

A I think that's—I think you are accurate to say "most" of it.

* * * *

Q (BY MR. HANLEY) Mr. Monfort, how would you characterize the ease of entry into the beef packing business these days?

A Well, in the last 10 years there has been one new entrant, Val-Agra, which we spoke of. Whether that—which, you know, the 10 or 20 years prior to that lots of entries. Whether that means that it's harder to get in or doesn't look as tempting, I don't know which.

Q Is it accurate to say that there is no nonpurchaseable technology as you might have in a high-tech field?

A Yes. You don't have to invent a computer get [sic] into it, yes. The technology is available. It's a matter of interest in the business, dollars it takes to get in the business, dollars it would take to stay in the business the first couple of years you are in it, and taking the market away from someone else.

One thing that I know that most people don't [Def. Ex. 7W p. 69] understand is that a new packing plant does not add one pound of meat or one head of cattle to the production. So any new entrant has to take business away from someone.

Q This nonexpandability of the business, is that related directly to the number of cattle that are available?

A The number of cows that had a calf a year ago and that type thing.

Q What is there about the cattle-growing business that makes that a fact? Why isn't it expandable? Why can't we have more cows?

A Theoretically, if you had a highly profitable industry, which it hasn't been—and I'm talking here about the producer part of the industry—

Q Yes.

A —if it was highly profitable, I'm sure it would be expanded slowly over a period of time. But it hadn't been profitable and I, for one, think in [sic] rather a mature industry where numbers are going to stay fairly flat. What happens if ranchers decide they want to produce more cattle, more feeder cattle? First they have to make a decision to keep a heifer an extra year to breed it. Then, it's nine months before it has a calf. It's another year and a half before it goes in the feedlot. Another five or six months before it comes out of the feedlot. So there is lots of time involved in changing the industry.

[Def. Ex. 7W p. 70]

Q Is it accurate to say that the capital expense for entry at an efficient scale is relatively low?

A It seems high to me. It's relatively low compared to sales volume, for instance.

Q Can entry be fairly quick, would you say?

A Well, if you decided—if you decided you wanted to enter—after finding out how good the business is in this trial, you may want to enter it—you would have to find location, number of governmental type things that you would have to solve. But it's—it would probably, once you got all those solved, it probably takes you a year to build the facility, another year to get the facility operating at anywhere near an efficient manner. So, you know, it's a period of two or three years, I suppose.

Q Where is Val-Agra in that process?

A Val-Agra found two slaughter plants, primarily slaughter, although they each one had some fab capability, that were—I understand, I haven't ever been in either plant—but I understand were fairly efficient slaughter plants that had been closed, as I say, somewhere between six months and two or three years. They acquired those plants, what, six or eight months ago, are slaughtering cattle, are producing some boxed beef and right now are planning on adding to that processing capacity—the boxed beef capacity—and are building these additions that probably are going to take nine months to [Def. Ex. 7W p. 71] a year to build on each plant. Then they will have the market development and the training of people problems. So I would say they, by acquiring some plants, they probably cut that time frame six months or so.

* * * *

[Def. Ex. 7W p. 92]

Q What competitors in the meat packing/fabricating industry do you now consider to be dominant?

A Well, I think IBP has gotten to the point where they are close to being considered that.

Q Any others?

A Not today.

Q How has IBP's position changed since 1981 so that you now consider it to be dominant?

A 1980.

Q 1980. I'm sorry, I misspoke.

[Def. Ex. 7W p. 93]

A I'm not sure whether they had opened their Amarillo plant. I know they had not opened their Finney County

plant in Kansas. I know they had not double-shifted Pasco, Washington. So they have continued to grow and have gotten to be a larger and larger force in the industry.

Q I'm interested in this double shifting. By going to two shifts a day, you can practically double your production; isn't that correct?

A Yes, yes. You know, normally most plants—our Greeley plant, for instance, has not double shifted. We would have to spend additional money to do that and have to have the cattle availability. But we could, in effect, double our production with the same basic plant with some additional coolers.

Q Assuming you had a plant that would permit that double shifting, would the double shifting increase the cost per unit?

A Decrease.

Q Decrease the cost per unit. By what factor?

A We think in Greeley that it would decrease our cost somewhere around 15 percent. That is our cost of operations, not the cost of meat.

Q I understand.

A Yes.

• • • •

[Def. Ex. 7W p. 95]

Q Off of that subject finally. Monfort contends, does it not, on the selling side, that there is a national packer-boxed fed beef primal and subprimal cuts market, including in the market only those firms that now both slaughter and fabricate the product; is that right?

A Yes. I think that's right.

Q Would you tell me how packer boxed beef is different than beef cuts boxed by nonpacker fabricators?

• • • •

A Okay. There are some differences. The [Def. Ex. 7W p. 96] differences between packer-boxed beef is that basically the major packers all have pretty much the same specifications for the beef they will put in a box. That specification says that they do not put yield grade 4's and 5's, which are the overfat carcasses in boxes. It says they won't put beef in the boxes that is not equivalent to the good grade. It says that they won't put Holstein-type cattle in their regular boxed beef program, and that they won't put lightweight carcasses in their program.

So you have developed an industry and certainly a beef trade based on these specs that a buyer—a chain store buyer or a purveyor servicing the hotel/restaurant institutional market will say, for most intents and purposes, that IBP, Excel, Spencer, Monfort, Swift products in that category are basically interchangeable.

Now, certain retailers continue to operate their own processing and fabricating plants and produce cuts just for their own stores. Probably that operation is similar to our operation, although I would maintain that it is a short-lived-type oepration. Other packers—other companies, jobbers, distributors will buy the yield grade 4 cattle from us, from IBP, from—I'm not sure about Excel—but from various people, defat those cattle and sell them to certain customers, but normally not the same customers that are buying this broad category of what I call box beef, but the meat ends up getting [Def. Ex. 7W p. 97] eaten also.

Q Who establishes these specifications or standards that are followed by the packer-boxed beef to people?

A It's embarrassing to say, but I think all of us have followed IBP in that regard.

Q Are those standards or specifications published in any periodical?

A I don't know about periodicals. I think—I think probably all of us have brochures that basically list those standards.

Q Were they the result of any trade association work?

A No, no. I think IBP basically set their quality control standards and the rest of us, trying to compete with them, basically followed those standards.

Q Are those standards generally available in the trade—those specifications?

A What do you mean "available"? A listing or—

Q Yes, if you wanted to know what IBP's standards were, could you readily ascertain what they are?

A Oh, yes. I think they probably have brochures and things that say what they are.

Q Is there anything to prevent the nonpackers from following those specifications?

A The independent jobber, no, no. Basically some [Def. Ex. 7W p. 98] of them do follow those specifications.

Q Do you have any evidence that the companies, for instance, who do their own fabricating do not follow the IBP specifications?

A Well, Excel, for instance, according to what I have heard in the trade, is using their Wichita plant to fabricate some of these off-grade cattle, box them in a different colored box or one that doesn't say "Excel" on it or something and sell that product. I can't think of any of the other majors that are not following the specs.

Q Assuming that the fabricators, whoever they are, follow these IBP standards, for the purchaser of the boxed beef, the products are perfectly substitutable, are they not?

A Probably more so than any of us want to admit. We like to claim that ours are trimmed a little better, we are a little more careful with our quality control, but, basically, they are pretty interchangeable.

Q Is it also true, Mr. Monfort, that firms that now produce nonvacuum-packed primal and subprimal cuts could vacuum-pack them if they obtained vacuum-packing equipment?

A I don't know of hardly any firms that do that. I think there are probably still a few, and those would be called jobbers or breakers in, maybe, Los Angeles, Chicago, New York, that do that for a local service-type business.

Q I want to make sure I understand. Do what?

[Def. Ex. 7W p. 99]

A Well, break a carcass into primals and deliver primals to retailers, basically.

Q I'm saying, if you take these people who are not packers but who are fabricators or people who at this point do not produce vacuum-packed cuts, there is nothing other than the vacuum packed equipment to prevent them from selling vacuum-packed beef?

A First of all, I think that's almost a nonexistend [sic] group of people. There may be some—

Q Excuse me, I want to make sure we are together. There are not people who are selling nonvacuum-packed?

A I would say virtually none as far as tonnage goes, and that people that do that— There used to be a lot of that 20 years ago, and people that do that basically would not have the room, most of them, to add the vacuum equipment, the box storage equipment, the box-making equipment, et cetera; but, you know, I don't think the

class, in itself, is big enough to be of any consequence to anyone.

Q About how much does a vacuum packing machine cost?

A Oh, that's an area where the companies have been very good in planned obsolescence. The new ones cost a couple hundred thousand dollars apiece. A two-year-old one is worth probably $5,000. So it's—there is lots of new technology in that area.

[Def. Ex. 7W p. 100]

Q Let me see if you agree with this. I think I understand that you are saying there isn't very much of a class of people who are now selling nonvacuum-packed boxed cuts, but is it true that there are firms that do not now fabricate primal and subprimal cuts who could do so without a great deal of expense?

A I don't believe so.

Q Strike the "primal and subprimal cuts." Is it true that there are processors now who fabricate beef from cows and bulls, box and sell it for grinding who could convert the fabricating primal and subprimal cuts from fed cattle?

A I presume—I presume they could. There are cow processors, cow slaughterers who, at considerable expense and it would be a whole new business for them, I think they would have the same entry problems, almost, as anyone starting from scratch.

The Cattle King that is getting all the bad publicity may be one to try that after a while, but it would be very complicated for them to get into a totally different business.

Q Could you just outline some of those complicating factors for us?

A Well, first of all, there is very little between the two that are compatible. We have talked previously a little about the differences in the kill floor. A modern [Def. Ex. 7W p. 101] fabricating plant for carcasses versus a boning plant for cows has very little similarity in physical layout or butcher skills, either one.

Q Okay.

A So the work force would have to be retrained. The physical facilities would have to be changed, the whole sales force would have to be changed, and you would be the new kid on the block, and you would have the same entry problems as anyone else.

Q In order to save us time, would you agree that just as we saw all the elements on the buyer's side of this market, that the configuration of products and the methods of sale make sales of beef highly complex transactions?

A Yes, I think that's highly complex.

Q I would like to talk with you for a minute about the acquisition of your Grand Island plant from Swift & Company, and I would call your attention to a letter previously marked Exhibit G to Swift & Company from Samuel Addoms, A-d-d-o-m-s, president of Monfort of Colorado, Inc., dated December 22, 1978. At that time Mr. Addoms was president of Monfort?

A Yes.

Q Have you seen this letter before, sir?

A Probably, but not recently.

Q Do you recognize Mr. Adams' [sic] signature on the [Def. Ex. 7W p. 102] third page?

A Yes, I'm sure that is his.

Q The letter indicates that the total purchase price for the facility, the Grand Island land, was $5,250,000 payable $1,475,000—

A Thousand dollars.

Q —thousand dollars on closing and $3,775,000 through the assumption of a lease between Swift and the city of Grand Island; is that correct?

A Yes. That's until revenue bonds were issued.

* * * *

[Def. Ex. 7W p. 105]

Q It's true, is it not, Mr. Monfort, that until 1982, Spencer's Schuyler facility competed directly with Monfort in purchasing fed cattle in Nebraska?

A Yes..

Q And in December of 1982, the Schuyler facility was closed?

[Def. Ex. 7W p. 106]

A I don't remember the date, but— Yes, I guess it was, right before Christmas.

Q And since about that time—or since that time, Schuyler has not competed directly with Monfort in purchasing fed cattle; is that right?

A Schuyler has not. They still have buyers in our area buying for Oakland and Spencer.

Q Since December of '82, Schuyler has not competed directly with Monfort in purchasing fed cattle in Nebraska?

A Well, again, maybe I'm leaning on semantics, but the Land O' Lakes has a buying group, and we still have Land O' Lakes buyers in our area, but they don't buy cattle for Schuyler.

Q Well, in any event since December of 1982 Monfort has engaged in its business in the absence of Schuyler's competition at the Schuyler plant in fed cattle production?

A Procurement, yes, and production.

Q Is it fair to say that Monfort would like to see the Schuyler facility shut down permanently?

A Oh, no more fair than to say we would just as soon be the only packer in the business. I have never assumed that it would be shut down permanently.

Q Have you ever told anyone that you would like to see Schuyler shut down?

A If I said it— Theoretically, I might have said [Def. Ex. 7W p. 107] it, never thinking seriously that it would happen, no. I don't remember saying it, even.

Q Do you know Mr. Ronald Dudley?

A I think I have talked to Mr. Dudley over the phone.

Q He is the group vice-president and chief operating officer for commodities of Land O' Lakes, Inc.?

A As I say, I have heard of him, and I think I have talked to him over the phone, yes. I know I have talked to him.

Q Do you know that he is the group vice-president and chief operating officer for commodities of Land O' Lakes?

A I think I read that, yes.

Q And you talked to Mr. Dudley by telephone?

A He called me one day in regard to disposition of the Spencer plant.

Q Would you place that conversation around May of 1983?

A Yes, I think so.

Q And at that time you expressed an interest in purchasing some or all of the assets of the Spencer Beef Division of Land O' Lakes?

A As I best can recollect, I did not express that to him. I expressed that to his boss, Mr. Hofstead.

Q Would you spell that for me, just phonetically?

[Def. Ex. 7W p. 108]

A H-o-f-s-t-e-a-d, or something.

Q During this telephone conversation that we have been discussing, is it true that Mr. Dudley asked you if Monfort had arrived at an offer on all three Spencer Beef plants?

A I don't believe that is—no, I don't think that is how that conversation went.

Q Did you tell him during that conversation that Monfort had not arrived at an offer on all three Spencer Beef plants?

A I told him we were not interested in buying all three Spencer plants.

Q Mr. Dudley asked you if you were interested in purchasing either the Oakland slaughter/fabrication facility or the Schuyler slaughter/fabrication facilities; is that correct?

* * * *

Q (BY MR. HANLEY) Did you have more than one conversation with Mr. Dudley?

A No, not that I remember.

Q So you had one conversation with Mr. Dudley, and you had one conversation with his boss?

[Def. Ex. 7W p. 109]

A Yes.

Q And you don't have a clear recollection at this time of what you said in each of those conversations?

A I think I have a fairly clear—

Q Oh. Well, let me ask you, in either of those conversations, were you asked if you were interested in purchasing either the Oakland slaughter/fabrication facilities or the Schuyler slaughter** fabrication facilities from Land O' Lakes?

A I was asked if we were interested in purchasing all three. I told him that was a compliment, for them to think that we could purchase and operate all three, but that we certainly wouldn't be interested in purchasing all three. We might be interested in purchasing one of the two plants if it was available.

Q Didn't you reply that you were more interested in the Oakland facility?

A No, no. I told them that we would be interested in either Schuyler or Oakland; that Oakland probably made more sense to us since it was further from Grand Island, but that I had never been in that plant. I would need to look at the plant. And that Schuyler, he had been in, but it had been four or five years prior to that.

Q The Schuyler slaughter/fabrication facility is located not far from Monfort's Grand Island [Def. Ex. 7W p. 110] slaughter/fabrication?

A I think someone said 60 miles.

Q Did you tell either of these gentlemen in your conversations that rather than purchasing Schuyler, you would rather have Schuyler shut down?

A I may have kidded with Mr. Dudley and told him that, I don't remember, but from your line of questioning, evidently he thinks I said that, and may have kiddingly said that.

Q Was there any indication on Mr. Dudley's part that he considered this to be kidding?

A Well, I know that they knew we would be interested in buying the Schuyler plant or the Oakland plant, and I know, also, that they would know that we wouldn't be buying it to leave it closed. So there was never any doubt in there—there shouldn't have been any doubt in their mind but what I knew that that plant would operate because I always believed it would. Still do.

Q Couldn't you have had the best of all possible worlds by buying the Oakland plant and seeing the Schuyler plant remained shut down?

A Well, that's just unrealistic. That plant is feasible enough, valuable enough, and competitive enough it won't be shut down.

Q Perhaps to be fair, why don't you tell me what [Def. Ex. 7W p. 111] your best recollection is of the substance of the two conversations that you had with these Land O' Lakes representatives.

A Well, basically, Mr. Hofstead called me one night at home, told me they were about to make a deal on those three plants; that he understood that we might have an interest in buying the plants; and, if so, why, I would have to move very quickly.

I told him that— That's when I told him I was flattered if he thought we could afford to buy all three plants, and told him that we would be interested possibly in one of the two plants, either Oakland or Schuyler, and asked him if he had them priced. He said he had the three plants priced as a package at $85 million, and that any bid he got for the three separately would have to be better than his bid for the three together.

I said, "Well, how close is your bid to the asking price?"

He said, "Very close." He said "We were bid better than this by someone else." He didn't tell me this was

Excel that had made the bid he was talking about. He said he had been bid better than that by someone else, but they believed that the better bid would have antitrust problems.

I said "Well, if we are interested in buying one of those plants, why, we would need to look at them." He said [Def. Ex. 7W p. 112] that he would have Mr. Dudley call and give me some facts and figures about the two plants, cost of production, efficiency, numbers of production; and that he would expect us to determine what we would bid based on that and to put up some earnest money before we looked at the plant if he thought our bid was competitive.

I told him I would have to think about that.

He told me he would have Mr. Dudley call me the next day. I believe that was the substance of our conversation.

At the time I remember thinking that I did not know whether the bid he had in his pocket was from Excel or Val-Agra because I had heard rumors of both.

The next day Mr. Dudley called and he said he was supposed to give me some information on the two plants. And I told him that after thinking about it, that under the ground rules they had laid out, I had no interest in bidding on the plants—either one of the plants without looking at it prior to that; and that I thought he was bid pretty well; and that if I listened to any information about the plants, I would just be being nosey. That is the best I can recollect of those two conversations.

Q Do you have any present recollection of telling him that you would rather have the Schuyler plant closed?

A I may have said, "The way things are now [Def. Ex. 7W p. 113] probably fits us better than anything." I may have said that, but as I say, if I was, I was being flip about it because I knew that they were about to sell.

Q Well, theoretically, assuming that the Schuyler plant could be closed, would it be beneficial to Monfort to have the Schuyler plant closed down from a competitive standpoint?

A Oh, sure. Sure. You know, we talked—we talked most of the morning about how everyone in the industry prospers from less competition and, obviously, that would be better than having—but I never once believed that that would be a longstanding situation.

Q You are saying that if Schuyler were closed, there would be more cattle available for you in that area?

A Well, there is more cattle available, allows us to run more hours, allows other packers in the area to run more hours, sure.

Q But it would give you a geographical advantage over your other competitors?

A Well, it probably gives IBP more help than it does us because they kill more cattle in the area than we do, but it, you know, it probably— That plant being closed probably helps everyone in that particular area that slaughters cattle.

Q Where does IBP do more cattle slaughtering in [Def. Ex. 7W p. 114] that area than you?

A Well, they have a number of plants. Their Dakota City plant is bigger than our Grand Island plant, but they also slaughter at West—

Q West Point, Nebraska?

A Yes. Luverne, Minnesota; Fort Dodge, Iowa.

* * * *

[Def. Ex. 7W p. 115]

Q (BY MR. HANLEY) Mr. Monfort, if Land O' Lakes' Schuyler plant were to remain closed, that would result

in an increase in cattle available to be purchased in the Nebraska area; is that right?

A No.

Q Why not?

A Same number of cattle would be available to be purchased.

Q Oh, yes. I misspoke.

A Theoretically—

Q It would mean, though—

A The other packers would be allowed to purchase more cattle and run more hours with a given amount of cattle.

Q Oh, sure, okay. And having decreased one of the purchasers, it would create something equivalent to a temporary oversupply of cattle in the area?

A You might say that. But, you know, strange as it may seem, the last month or so, why, the cattle price in the Nebraska area has been higher than in the Texas area. So these things are hard to trace exactly.

Q Wouldn't you agree, though, that logically if that plan [sic] stayed closed for any appreciable period of time continuing, it would tend to depress the price of cattle in that area?

A It would tend to.

[Def. Ex. 7W p. 116]

Q And wouldn't buyers from other areas outside of Nebraska then come into Nebraska and buy those cattle—seek to buy those cattle?

A Well, either that or the packers and processors that are already there would run more hours than they would have otherwise. As I say, right now you have a situation

where Nebraska buyers are buying cattle in Kansas, which is not normally something, just because there is, at least at this time, a shortage of cattle in Nebraska.

Q Is it true that Monfort sells a substantial portion of its boxed beef to hotels, restaurants, and large institutions?

A We may sell a slightly larger percentage of ours to the REI [sic] trade, hotel restaurant institutional trade, than other packers, but that percentage differs from IBP or Excel or Swift is probably minimal.

Q As far as the portion of your sales, would it account for more than 50 percent?

A No, I don't believe it would.

Q Can you give me an idea of the range?

A I would say 40 to 50 percent.

Q Could you list for me the name of some of these hotels, restaurants, and institutions that you supply beef to?

A Direct from the packing plant?

Q Okay, let's do that first.

[Def. Ex. 7W p. 117]

A We have no significant customers. Where we probably get a little more penetration in that REI [sic] business percentagewise than others comes from selling or transferring, I guess would be the real term, transferring beef from the packing division to our distribution company, which operates 22 REI [sic] supply houses in various areas. Their customers are numerous and not very large, so I really don't know a lot of names there.

Q Do you sell to A and P on a fairly regular basis?

A We sell to A and P fairly regular. They are not very high on our list of accounts, but we do sell to A and P.

Q Can you give me some that you would consider to be high on your list of accounts?

A Yes. We sell—we sell Safeway fairly large quantities of meat, Grand Union, Wake Fern, Winn Dixie, Kroger. You know, it's pretty well west of the major chains in the country. Frankly, I don't know of any of the major chains that we don't sell meat to.

Q On this REI [sic]—

A None of those are REI [sic]—

Q I understand.

A Okay.

Q On the REI [sic], I am trying to get some idea. What kind of institutions are we talking about? Are you talking about universities or prisons or—

[Def. Ex. 7W p. 118]

A Well, yes, hotels and restaurants, understand, institutions can—that is basically the term that is used for that kind of business—REI [sic]; but yes, we sell universities. We will sell—once in a while we will sell prisons. We sell inplant feeders, hospitals; that type of thing.

Q You don't sell these REI [sic] customers just your Monfort gold?

A No.

Q You don't restrict your boxed beef to white-tablecloth restaurants?

A Oh, no, no, no. They would starve to death if you did that.

* * * *

[Def. Ex. 7W p. 119]

Q By the way, when you slaughter cattle, what happens to the meat-fed cattle? What happened to the meat from animals at grade 4?

A Yield grade 4?

[Def. Ex. 7W p. 120]

Q Yes.

A Well, we sell them as carcasses to someone else who—I think I mentioned this before, but basically—

Q Yes.

A —they will probably defat them because that's what makes them unacceptable in the trade, probably defat them to a certain extent and sell them, probably, fabricate them and sell them as primals or maybe even put them in boxes and sell them to— I frankly don't know who the buyers of that product—the end buyer is.

* * * *

Q Do you ever sell or have you ever sold meat from animals that yield grade 4 as boxed beef?

A I don't believe we ever have.

Q As I understand your com laint—the complaint, Monfort has expressed in this case a fear that Excel and IBP would, after the Spencer acquisition by Monfort—

[Def. Ex. 7W p. 121]

A By Excel.

Q I'm sorry, by Excel. I have done that several times. —come to an agreement on price and depress or raise uncompetitively the price of cattle?

A I have never said that they would come to anything by agreement.

Q You don't think they could?

A No.

Q Well, let me ask you this: If they were going to do that, if Excel and IBP had it in mind that they would like to either depress or raise it, is there any way that they would go about working out that kind of an agreement with the—

A Is there any way that they could collude? Sure. I don't believe they would. I have no reason to believe it. The history of neither company would lead me to believe that. I believe both companies are run by honorable people, and I just can't imagine. But could they successfully? Sure, they could.

* * * *

[Def. Ex. 7W p. 123]

Q That's capital punishment.

With that kind of history, with that kind of industry practices and training and compensating their buyers, can you tell me how Excel and IBP—again, on a hypothetical basis—could possibly go about restraining those buyers so that they could depress the market?

A Not depress the market. If they were trying to get rid of us as a competitor, they wouldn't depress the market, they would raise the market.

* * * *

[Def. Ex. 7W p. 124]

A Theoretically, sure. Say the two—this is all hypothetical, don't believe it would happen. Say the two decided

"Let's get rid of Monfort." Excel says "We are mad they brought that lawsuit. Let's get them the hell out of the business." They could give their buyers that are closest to our Grand Island plant higher buying orders than other people. On the other other [sic] hand, they could say "Okay, we know where some Monfort beef is being sold. Let's get very aggressive on those accounts."

Q (BY MR. HANLEY) And tell them to go out and offer too much?

A No, I'm saying offer too much for the cattle and sell the meat too cheap.

Q As you point out, that would be absolutely unheard of in the business, correct?

A Well, it would be—you know, it would be counter to what we all try to do day-by-day, and I don't believe that would happen.

Q Then, without the agreement, which you have objected, how would Excel and IBP go about raising the price in the market under present conditions without agreement?

[Def. Ex. 7W p. 125]

A Well, without agreement, the mere concentration on market share—the two packers could, instead of killing somewhere along in here, why— Let's take this entire mid-west, southwest area. Instead of killing 32,000 cattle, go like that, whatever the applicable figure is, in five days could move their kill up to 40,000; in six days buy 8,000 cattle that normally would be bought by ourselves, by National, by Minden, by all these other packers. Obviously, we would try to stay in business, so we would fight with them. We would try and buy our share and, in effect, raise the relative price of cattle. At the same time they are selling more beef, they are getting aggressive in their sales volume, which sales attitude—which they have to

move the extra supply of beef, and that is the price—cost/price squeeze of which we talked in the interrogatories.

Q In that situation that you have just stated, do you believe in order to make this operate, the companies would have to reduce that margin to zero or less or would they operate—are you saying that they could operate above their costs?

A Well, they might operate below—at cost or below cost or slightly above cost, although slightly above cost we will compete with them. They would actually, I think, in order to get rid of us and some of the other good operators and stable companies that I mentioned, they would have to [Def. Ex. 7W p. 126] probably lose money themselves to chase others out of business.

Q Do you know of any historical examples—

A No.

Q —in the industry?

A No.

* * * *

[Def. Ex. 7W p. 128]

Q Wait, just a minute. You said a hypothetical. What I'm talking about is your definition of the price squeeze that we discussed this morning, and you're saying that after [Def. Ex. 7W p. 129] the acquisition that is the subject of this lawsuit, if I understand you correctly, that one of the problems would be that by the utilization of this price squeeze without any agreement—

A The fight for market share.

Q —agreement independently, that that squeeze would have to be in place for a period in excess of six months. Would you agree with that?

A Well, let's say that I'm fearful of that happening, and that I would think it would take, sure, over six months.

Q Over six months. I have a very distinct recollection, and we can go back and check our notes, but I have a distinct recollection that you used the term two years.

A I think I used the two-year term. You were saying hypothetically if this happened for six months, and I said I didn't think it would happen that quick. It would be—

Q Two years?

A It would take longer.

Q I also understand you to say that in order to make this work, the dominant companies would have to, or might, price at below cost.

A Well, that could happen, but let's—let me define "cost." With Monfort of Colorado, cost includes certain corporate overhead, includes interest rates—interest [Def. Ex. 7W p. 130] costs, it includes an array of things?

A I have no knowledge of how IBP/Occidental keeps their books, I have no knowledge of how Excel/Cargill keeps their books. So what might be below cost for me might, in fact, not be below cost for them.

Q Is it realistic to believe that Excel and IBP would operate at or below their costs for a period of two years?

A It depends upon how hungry they are for market share and what they think the rewards of getting a certain size and a certain dominance—what rewards would accrue to them if they—

Q Isn't it more likely that sometime during that two-year period they would change their practices and sell above costs?

A I frankly—you know, I think the ideal thing from their standpoint would be to get 50 percent market share.

Each one of them would say for us to get 50 percent market share and make money doing so. But it depends upon which was the driving force, the market share or the making money.

Q How does this acquisition by Excel change IBP's market share?

A It really doesn't change IBP's market share. It probably would change the way they react because they obviously at this time are considerably larger than the second [Def. Ex. 7W p. 131] largest—after this acquisition, if it were to go through, they would be about equal in size, and just knowing those people, they will react different to that situation than they would being larger than Excel.

Q How?

A They will get very aggressive to try and regain their level of dominance that they think they have.

Q Do I understand correctly that "selling," under your definition of the cost/price squeeze, selling below cost, then, is not essential to the cost/price squeeze mechanism success, is it?

A Maybe not, depending upon the efficiencies the plants have and the bookkeeping that their overall corporations—i.e. Occidental and Cargill—have.

Q So the injury to Monfort might result even though the prices were above cost?

A Theoretically, theoretically.

Q Okay.

A There is a big difference in cost if Cargill doesn't charge them any corporate overhead, if they don't charge them the cost of this lawsuit, if they don't charge them the cost of interest on the money being used. There is a big difference in the eventual cost determined that way and Monfort's cost.

Q This injury might result even if the prices were [Def. Ex. 7W p. 132] above IBP or Excel's marginal cost?

A Define "marginal cost" for me.

Q Well, I have a hard time doing that because I'm not that well-acquainted with the industry?

A I'm not that well acquainted with the phrase.

Q I'm distinguishing between totally allocated cost, your totally distributed cost, and marginal as applied to this particular product.

A With totally allocated costs, I think we are competitive with Excel and IBP on a cost basis; therefore, to force us to lose money, they would probably have to lose money.

Q They would have to lose money?

A Probably have to lose money.

Q Is it true that under your cost/price squeeze theory, that other companies that might not be as efficient as Monfort might be forced to leave the market where, under this cost/price formula, IBP and Excel were selling above—slightly above their marginal cost?

A Yes. I think we are more cost-competitive than some others are that are still in the industry. So what might force us into a break-even situation might force other [sic] into a loss situation.

* * * *

PETITIONER'S

BRIEF

6

No. 85-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. and EXCEL CORPORATION,
Petitioners,

v.

MONFORT OF COLORADO, INC.,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Is a competitor fearing heightened competition entitled to an injunction against one rival's acquisition of another on the ground that increased concentration and a "deep pocket" inherently "threaten" competitors with predation and therefore "loss" under Clayton Act § 16?

2. Under Clayton Act § 7, may a court condemn a merger that increases concentration within a particular segment of an intensely competitive industry without considering either competition from immediately adjacent industry segments or other factors that prevent noncompetitive behavior?

PARTIES TO THE PROCEEDING BELOW

The names of all parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are contained in the caption of this case. An amendment to Petitioners' Statement Pursuant to Rule 28.1 has been filed separately from this Brief.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-22a) is reported at 761 F.2d 570. The opinion of the United States District Court for the District of Colorado (Pet. App. 23a-73a) is reported at 591 F. Supp. 683. The judgments of the Court of Appeals and the District Court are reproduced at Pet. App. 74a and 75a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1985. On June 21, 1985, Mr. Justice White issued an order (Pet. App. 76a) granting petitioners' application to extend the time within which to file a petition for a writ of certiorari to and including September 20, 1985. The petition for a writ of certiorari was filed on September 19, 1985 and was granted on January 13, 1986. J.A. 441. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), is reproduced at Pet. App. 77a-79a. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), is reproduced at Pet. App. 79a.

STATEMENT OF THE CASE

On July 25, 1983, Monfort brought this action charging that Excel's proposed acquisition of the Spencer Beef Division of Land O'Lakes, Inc. ("Spencer Beef") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, because it would increase concentration among buyers in a regional market for the "procurement of fed cattle" and among sellers in a national market for the "sale of boxed beef." J.A. 16, 17. Monfort claimed that such increased concentration would threaten "Monfort's supply of fed cattle and its ability to compete in the boxed beef market." J.A. 20. On these grounds, the complaint asserted Monfort's entitlement, under Section 16 of the Clayton Act, 15 U.S.C. § 26, to preliminary and permanent injunctions preventing the acquisition.

The District Court consolidated consideration of the motion for a preliminary injunction with consideration of the merits. After a three-day trial, the Court granted the

relief Monfort sought, holding that the acquisition violated Section 7 and that Monfort adequately had alleged and proved that the acquisition threatened it with harm of a kind sufficient to support Section 16 relief. The Court of Appeals affirmed.

In the following statement we begin with a brief description of the beef industry. We then describe the parties' evidence and arguments, the District Court's conclusions, and the Court of Appeals' discussion of the issues in this case—first, with respect to whether the acquisition violates Section 7, and then with respect to Monfort's efforts to allege and demonstrate "threatened loss or damage" under Section 16.

Both in this statement and in the argument that follows, it is convenient to speak of "horizontal merger standards" and "oligopoly pricing." The former term refers to the methodology employed by this Court in appraising horizontal mergers in light of market definition, the shares within the market of the merging firms, the number and distribution—"concentration"—of leading firms, and certain other factors such as ease of entry. Underlying that methodology is the fear either (1) that the merging firms might themselves acquire control over output and price, or (2) that the several firms in a market might be better able to reach and police express collusive agreements, or to coordinate their price and output decisions tacitly, allowing them to decrease their output below and to raise their selling prices above competitive levels. *E.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963); *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964); IV P. Areeda & D. Turner, *Antitrust Law* ¶ 910b (1980). Because the last is the most frequent fear, we refer to this set of concerns with the shorthand phrase "oligopoly pricing."[1]

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[1] Similar coordination can occur on the buying side: where few firms

A. The Beef Industry

Monfort, Excel and Spencer Beef all engage in purchasing cattle, slaughtering them, and "fabricating" (cutting up) the resulting carcasses into smaller pieces of beef for resale to retailers, hotels, restaurants and institutions. Beef slaughterers buy cattle from ranchers and commercial feedlots and sell the slaughtered cattle in the form of carcasses either to fabricators or directly to retailers, especially large grocery chains, which fabricate the carcasses themselves. Pet. App. 27a. Alternatively, a slaughterer may itself operate a fabrication facility either physically integrated with the slaughter house or located elsewhere. *Id.* Slaughterers' and fabricators' net revenues are the difference between their input costs—the prices they must pay for cattle or cattle carcasses, plus operating costs—and the prices at which they sell cattle carcasses or beef cuts. Input costs in the beef industry are high relative to selling prices—*i.e.*, margins on sales are low. *Id.* Nevertheless, these margins may afford profitable returns to capital investment. Pl. Ex. 18 at 7.

The major competitors in the beef industry include IBP, Excel, Monfort, Spencer Beef, Swift Independent, Morrell, National, Val Agri, Sterling, Armour, Dubuque, Washington Beef, and High Plains, as well as major grocery chains, such as Winn-Dixie and Kroger, which operate their own fabrication facilities. J.A. 142, 145, 280. In addition, there are hundreds of smaller slaughter and fabrication firms. J.A. 411. However markets are defined, IBP is the largest firm in the industry, with output approximately twice that of Excel. J.A. 140, 145. The next largest firms after Excel are Monfort, Spencer and Swift Independent; they are of

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account for most purchases, they may be able to decrease their purchase volume, and thus force buying prices below competitive levels. This usually is called "oligopsonistic conduct." For simplicity, we use "oligopoly pricing" generically to refer to the likelihood of coordinated conduct linked to high concentration in both buying and selling markets.

roughly equal size, each with output approximately half that of Excel. *Id.* Although the District Court found that Spencer Beef is "the third largest beef packer in the United States," Pet. App. 27a, that was true only when the company's Schuyler, Nebraska facility, which accounts for roughly half of its capacity, was open. The Schuyler plant was closed in 1982 and remained closed at the time of trial. *Id.*

The beef industry has undergone two fundamental changes in the last forty years. Before World War II, cattle generally were shipped from ranchers throughout the United States to slaughterers in urban transportation hubs. J.A. 213-14. Since World War II, however, cattle (particularly steers and heifers) increasingly have been shipped to ranchers and commercial feedlots in grain-growing areas in the central part of the country. J.A. 215-16. There, they are fattened on grain and then sold for slaughter. These grain-fattened steers and heifers, known in the industry as "fed cattle," now account for roughly seventy percent of all cattle slaughtered. The remainder are (1) steers and heifers ranged on grass—so-called "non-fed cattle"—and (2) cows and bulls, which are used principally for the production of ground beef. Pet. App. 28a. This general migration of the feeding function to the central states has led many slaughter plants to locate in that area in order to minimize the costs of transporting cattle from feedlot to plant. *Id.*

The second major change is that fabrication facilities have moved closer to the slaughter plants. Prior to the mid-1960's beef was mostly shipped as carcasses to urban fabrication facilities, retailers and other purchasers. Pl. Ex. 60 at 2. In the mid-1960's, the improvement of vacuum packing technology made it possible for fabricators located near slaughter plants, with which they are frequently (but not always) physically integrated, to cut the carcasses into smaller pieces (*e.g.*, chucks, loins, rounds, ribs), seal each piece in an air-tight package and ship them in boxes to

wholesale and retail outlets. *Id.* Retailers then cut the pieces further into steaks, roasts and so forth for resale to consumers. This "boxed beef" process, which amounts, in essence, to shifting a part of the "fabrication" function upstream, results in increased product shelf life and may result in transportation savings, because less bone and fat is shipped. Pet. App. 29a.

Because of these changes, firms with slaughter plants in heavy cattle-feeding areas and those with boxing operations have tended to displace the least efficient of the "old-line" urban slaughter plants and fabricators that do not vacuum pack. J.A. 286. This competitive process has created opportunities for new or existing firms to displace less efficient competitors.[5] But the displacement has by no means been complete. Many independent fabrication firms and retailers with central fabrication facilities continue to purchase carcasses and process them into beef cuts, which they may or may not vacuum pack. As the District Court found, these firms currently account for 24 percent of beef fabrication. Pet. App. 29a. Many retailers and other purchasers without central fabrication facilities continue to buy carcasses and cut them up themselves for resale to consumers; these account for an additional 16 percent of beef fabrication. *Id.* Moreover, slaughter houses outside the central states area continue to account for 26 percent of all fed cattle slaughtered (Pet. App. 51a), and many slaughter houses both inside and outside the area operate independently of fabricators. J.A. 341, 345; Pl. Ex. 26. Since the owners of these various facilities continue to operate them and to compete in the market, they presumably find it profitable to do so at prevailing industry prices. At the same time, some firms that have modern, integrated slaughter and fabrication facilities in heavy cattle-feeding areas, like Spencer Beef's Schuyler plant, have not been successful because of noncompetitively high costs. J.A. 259-60.

[5] Monfort, for example, was already a major cattle feeder when it integrated forward into cattle slaughter and beef fabrication at its Colorado facility in the 1960's. J.A. 205. It subsequently bought and expanded Swift's Grand Island, Nebraska plant. J.A. 268-69; 283-84. Similarly, Val-Agri entered the industry in 1983 by purchasing two existing unused slaughter plants and adding fabrication facilities. J.A. 97.

Nevertheless, there is no question that better plant location, integration and product improvement have reduced some firms' costs and hence prices for the industry's output. J.A. 286-87. Kenneth Monfort, plaintiff's chief executive officer and principal shareholder, testified that throughout this twenty-year process, firms with higher operating costs have been caught in what he termed a "cost-price squeeze" as more efficient competitors have increased the price they are willing to pay for cattle and decreased the price they charge for beef. *Id.* As the District Court observed, both parties agreed that this process has been the result of intense competition, and that the industry has been and remains highly competitive. Pet. App. 27a.

B. The Section 7 Issues

1. *Relevant Markets and Market Shares*: In defining the markets relevant to Monfort's claims, the District Court essentially adopted the market definitions Monfort advocated. On the buying side, it defined the market to include those slaughter houses in a twelve-state central states area, encompassing Monfort's and Spencer Beef's plants in the north and Excel's plants in the south, that now purchase fed cattle for slaughter.[6] The Court based this definition largely on findings that, because of transportation costs, cattle procurement tends to be localized, and that 74 percent of all fed cattle are produced and sold

[6] Monfort's plants are in Colorado and Nebraska, Spencer Beef's in Nebraska and Iowa. Excel, on the other hand, has its major capacity in southern Kansas and the Texas panhandle.

within the twelve-state area. The Court rejected Excel's contentions that no economic barrier separates the twelve-state area from adjacent areas; that, in fact, fed cattle prices are determined by the supply and demand for such cattle in at least the entire area of the country to the east of the Rockies; and that prices are also affected by the ability of slaughterers that do not now purchase fed cattle in the twelve-state area to do so. To support these contentions, Excel presented evidence showing that, if fed cattle prices within the twelve-state area were depressed below competitive levels by a small but significant amount, cattle feeders in the area would begin shipping to slaughterers outside the area, particularly to slaughterers in immediately adjacent states. J.A. 118. By the same token, such a price change would make it economical for slaughterers that now purchase non-fed cattle to begin purchasing and slaughtering fed cattle as well. J.A. 92-93, 179-80.[4] The District Court concluded that this evidence was irrelevant to proper definition of the buying market, principally because the low profit margins that now prevail among slaughterers make it unlikely that fed cattle would

[4] In making these demonstrations, Excel used the test of market participation set out in the U.S. Department of Justice's Merger Guidelines, 47 Fed. Reg. 28,493 (1982), *revised*, 49 Fed. Reg. 26,823 (1984). To define relevant markets, the Guidelines begin with the firms that produce the same products as the merging firms—for example, root beer—and sell them in the same area. They then ask what would happen if root beer prices rose by a small but statistically significant amount. If, for example, buyers would quickly switch to ginger ale, or ginger ale producers would quickly begin producing root beer, ginger ale firms would be included in the market. By the same token, if root beer producers outside the area would quickly begin selling in the area, they too are included in the market. In rejecting Excel's market contentions, the District Court did not suggest that there are any factors in the beef industry that make the Guidelines' methodology inappropriate. Instead, as explained below, it simply rejected altogether both the methodology itself and the relationship of the questions it asks to the proper Section 7 inquiry.

be shipped outside the twelve-state area, or that non-fed cattle slaughterers would convert to fed cattle.

On the selling side, the District Court concluded that, although "the ultimate consumer is probably unable to distinguish" between beef cuts produced by different fabrication facilities and although retailers and others purchase 28 percent of the beef they buy in the form of carcasses, the relevant market was a submarket comprising only those firms, independent and integrated with slaughterers, that now fabricate boxed beef. Pet. App. 54a, 56a-57a. The Court rejected Excel's contention that prices of boxed beef are determined, not by the supply and demand for boxed beef alone, but by the supply and demand for all beef, including, in particular, carcasses. To support this contention, Excel presented evidence showing that carcass and boxed beef prices move in perfect synchrony, indicating that they respond to precisely the same supply and demand forces (Tr. 493-95), and that, if boxed beef prices rose above competitive levels by small but significant amounts, retailers and others would increase their fabrication of carcasses, and fabricators of non-boxed beef quickly would convert to the fabrication of boxed beef. J.A. 82-83, 91-93, 166-69, 171-72. The District Court regarded this evidence as irrelevant to proper market definition, principally because boxed beef is different from, and has a higher price than, non-boxed or carcass beef, and because beef production, boxed and non-boxed, by retailer-owned fabrication facilities would not be available to other purchasers. Pet. App. 54a-56a.

On appeal, Excel did not challenge the findings of fact underlying the District Court's market definitions. Instead, Excel argued that, by confining the markets to those firms that buy fed cattle and sell boxed beef at current competitive prices, and by focusing exclusively on what firms in immediately adjacent market sectors (*e.g.*, non-fed cattle slaughterers and non-boxed beef producers) "*actually* do as opposed to what they *could* do," Pet. App. 44a (em-

phasis in original), the District Court failed to take into account the competitive pressures that the latter firms exert—pressures that immediately constrain the ability of both fed cattle purchasers and boxed beef producers to engage in oligopoly pricing. The Court of Appeals did not address Excel's argument, except to say that the District Court's market definitions were not clearly erroneous. Pet. App. 15a.

Based on its market definitions, the District Court found that the acquisition would increase the four-firm concentration ratio from 52 to 57.5 percent in the buying market and from 53.8 to 59.5 percent in the selling market. Pet. App. 62a-63a. Excel's share of these markets would rise from 14.1 to 20.4 percent and from 13.3 to 20.4 percent, respectively. Pet. App. 13a; J.A. 64, 69. Under the standards of *Philadelphia National Bank* and other horizontal merger cases, the Court held that these concentration increases presumptively established that competition would be substantially lessened.[5] Pet. App. 64a.

On appeal, Excel pointed out that, had the markets been defined to include all firms whose supply and demand responses constrain the ability of fed cattle purchasers and boxed beef suppliers to engage in oligopoly pricing, the four-firm concentration ratio would rise from 42.2 to 47.4 percent on the buying side, and from 38.7 to 43.4 percent on the selling side; Excel's shares of these markets would rise from 10.5 to 16.0 percent and from 9.1 to 13.8 percent, respectively. J.A. 140-41, 145-46. When these market share figures are converted to the Herfindahl-Hirschman Index (HHI), the increase on the buying side would be from 699 to only 815 and on the selling side

[5] The Court also gave weight to a trend toward increased concentration in the narrow markets it had adopted. Pet. App. 62a, 63a.

from 605 to only 691.[6] *Id.* Moreover, the District Court ignored the fact that much of the capacity in the markets it defined is held by numerous small firms, which could immediately double their output by the simple expedient of adding shifts. J.A. 192, 289-90; Pl. Ex. 26. Given this, Excel argued, the significance of concentration based on current output is substantially reduced, since any oligopoly pricing attempt by industry leaders would lead to immediate expansion of output by smaller firms. The Court of Appeals, like the District Court, made no mention of this point and held that the District Court's presumption of anticompetitiveness was not clearly erroneous. Pet. App. 15a.

2. *Entry*: The District Court concluded that the presumption raised by the market share statistics was buttressed by the existence of high entry barriers. Pet. App. 64a-67a. The Court found that the "low sales margins" that prevail in today's highly competitive beef industry would discourage firms from spending $20 to $40 million to build an integrated slaughter-fabrication plant, and few suitable plants now seem to be available for possible purchase and expansion. Pet. App. 65a. The Court thus gave no weight to evidence that oligopoly pricing would create the incentive to build new plants by elevating returns and would induce expansion by the firms excluded from the defined markets, including the addition of new fabrication capacity by large retailers. The Court of Appeals held,

[6] The HHI is calculated by squaring the market shares of all market participants and then adding the squares together. For example, a market with 10 equal-size firms would have an HHI of 1000; a market of 20 equal-size firms would have an HHI of 500. The HHI thus provides information not only about concentration of capacity or output in the hands of the market leaders collectively, but also about size distribution among the leading firms. In its Merger Guidelines, the Justice Department states that it is "unlikely to challenge" a transaction in which the post-acquisition HHI is below 1000. 47 Fed. Reg. at 28,497.

once again, that the District Court's findings were not clearly erroneous. Pet. App. 17a.

3. *Other Factors*: Finally, in considering other factors relevant to the competitive effects of the acquisition, the District Court noted only the financial resources of Excel's and IBP's corporate parents. The Court found that "[w]hile Monfort does not allege that IBP and Excel will in fact engage in predatory activities . . . [t]he likelihood of predatory pricing is heightened by the vast financial resources available to both Excel and IBP." Pet. App. 71a. On appeal, Excel argued that the District Court erred in attributing competitive significance to the large assets of Cargill in the absence of any demonstration that this "deep pocket" was made any deeper by the acquisition, that those assets could be diverted to finance a predatory scheme, or, indeed, that Excel was either able or likely to engage in predation. In affirming, the Court of Appeals stated only that: "We would have no difficulty concluding that Cargill's financial resources would likely be used in an anticompetitive fashion if Excel acquired Spencer Beef and then engaged in a period of predatory pricing." Pet. App. 20a. The Court of Appeals also rejected Excel's argument that the District Court had erred in failing to address other characteristics of the industry, undisputed on the record, that Excel's experts testified would prevent oligopoly pricing despite the increased concentration the acquisition would cause.[7] The Court of Appeals concluded that the District Court properly had confined its analysis to "limited information" about the industry. Pet. App. 18a.

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[7] Apart from the "fringe capacity" point discussed above, evidence presented by both parties demonstrated, for example, that the existence of large scale purchasers, armed with the incentive to detect noncompetitive conduct, the ability to switch their purchases among various suppliers, and the ability to integrate backward themselves, would make oligopoly pricing very difficult to sustain. J.A. 43, 167-68, 197-98.

C. Monfort's Injury

Monfort's theory as to how the acquisition would cause it injury, as well as its principal evidence that such injury was likely to occur, was presented through the testimony of Kenneth Monfort. According to Mr. Monfort, following the acquisition IBP and Excel, acting independently, would "each seek aggressively to increase its share of the market" by cutting profit margins—paying more for fed cattle and charging less for boxed beef. J.A. 285. This effort to "aggressively compete for market share" would result in a "cost-price squeeze," which "could severely injure the smaller competitors of IBP and Excel including Monfort." J.A. 286, 628. In fact, Mr. Monfort said that others in the market without the resources of IBP and Excel could be forced out of business, and that these "others" might include Monfort itself. J.A. 275-76. As a result, in the long run, those competitors that remained in the industry might be able to exercise market power and reap monopoly profits. J.A. 276. Mr. Monfort, however, specifically disclaimed any contention that Excel and IBP would act in collusion with each other in an effort to drive others out of the market. J.A. 285. Moreover, Mr. Monfort made it clear that the "cost-price squeeze" to which he referred would be "the result of competition," not of any predatory strategy to incur losses in order to eliminate rivals. J.A. 287.

At the close of Monfort's case, Excel moved for involuntary dismissal, urging that the evidence Monfort had presented failed to establish the kind or probability of injury necessary to support Section 16 relief. Excel argued that Monfort had failed to show any causal link between the acquisition and the "heightened competition" it claimed to fear, since the competition it described would exist whether or not the acquisition occurred. Indeed, Excel suggested, what Monfort really feared was Excel's reopening of the Schuyler plant, and the renewed compe-

tition in fed cattle purchasing in the area around Monfort's Nebraska facility. Moreover, by resting its claim of harm on heightened competition between IBP and Excel, Monfort both contradicted its theory of violation, which rested on a prediction of oligopoly pricing, and failed to establish "antitrust injury" under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—*i.e.*, "injury of the type the antitrust laws were intended to prevent." *Id.* at 489.

The District Court denied Excel's motion and subsequently held that Monfort had satisfied Section 16's "standing" requirement because "the harm or injury alleged by Monfort is of the type that is likely to be caused by the alleged violation." Pet. App. 38a. The Court acknowledged that "Monfort contends that it will be driven out [of the relevant markets] by the impact of heightened competition between Excel and IBP in their quest for increased market share." Pet. App. 70a. It also recognized that Monfort "does not allege that IBP and Excel will in fact engage in predatory activities as part of the cost-price squeeze." Pet. App. 71a. The District Court stated, however, that such activities were possible because of (1) "the market shares that would exist following the acquisition," (2) "the acknowledged difficulties in acquiring greater market share by other methods," and (3) "the vast financial resources available to both Excel and IBP, resources not available to the plaintiff." Pet. App. 71a.

On appeal, Excel urged that the District Court erred in denying Excel's motion to dismiss and in subsequently concluding that Monfort had established "threatened loss or damage" under Section 16. Excel again argued that the record failed to suggest a causal link between the acquisition and any injury to Monfort; in any event, Monfort's asserted harm from heightened competition was not, under *Brunswick*, injury of a kind entitling it to relief. In its Response on appeal, Monfort reiterated that Excel's acquisition of Spencer would allow it to contend with IBP for market share, thus squeezing industry margins and

endangering Monfort's profitability. It also suggested a specific causal link between the acquisition and how this might occur, pointing to evidence that the acquisition would give Excel multi-plant scale efficiencies that Monfort did not have. In its Reply, Excel argued that the achievement of efficiencies, if that was what would cause Monfort harm, in no way contributed to making the acquisition unlawful and therefore did not suggest "antitrust injury" at all. In addition, Excel argued that since there was no basis in Monfort's own contentions or in the record for believing that Excel, alone or with others, either could or would engage in a predatory strategy, the conduct Monfort said it feared was necessarily competition only.

The Court of Appeals affirmed, in effect treating the problem as if it was a question of the adequacy of the pleadings, rather than a question of the legal sufficiency of Monfort's effort to establish "threatened loss or damage."[8] In a Section 16 case, the Court stated, "*Brunswick* mandates only" that there appear to be a "causal connection between the threatened injury and the putative antitrust violation." Pet. App. 5a. The Court held that Monfort's theory of harm satisfied this test. The Court stated:

> Monfort claims that Excel will be able to engage *in what we consider to be a form of predatory*

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[8] In a footnote, the Court of Appeals appeared to suggest that although Excel had challenged Monfort's "standing," which the Court said was properly a "threshold inquiry," Excel did not contend that Monfort had failed to establish the elements necessary for Section 16 relief. Pet. App. 5a-6a n.2. This is incorrect. In its motion to dismiss at the conclusion of Monfort's case, and in urging on appeal that denial of the motion was error, Excel consistently contended that Monfort had failed to establish that the acquisition would cause it injury of any kind sufficient to support a Section 16 injunction. Specifically, Excel's Reply Brief, to which the Court of Appeals' footnote refers, argued that Monfort's proof of injury of any variety was entirely speculative, and that the speculations of harm were unrelated both to the acquisition or to those factors that assertedly made the acquisition unlawful.

> *pricing* in which Excel will drive other companies out of the market . . . .

Pet. App. 7a (emphasis added). Having thus recharacterized Monfort's claim of "heightened competition" as a form of predation, the Court concluded that this theory of harm was plausibly related to the theory of violation:

> Monfort contends that Excel would be better able to engage in such a sustained period of predatory pricing if it possessed the additional market power that would come with increased market share following acquisition of Spencer Beef. Thus it claims that the harm to competition, as well as the injury it will suffer as a competitor, is directly tied to the putative Clayton Act section 7 violation.

Pet. App. 8a.

The Court recognized a danger that competitors may try to block procompetitive mergers of their rivals by claiming a possibility of predation. Pet. App. 10a. It concluded, however, that this danger is tolerable, and consistent with Congress's prophylactic purposes, since such challenges will achieve their objective only if the competitor succeeds in showing a Section 7 violation. Pet. App. 12a. Here, the Court held, Monfort had shown that the violation of which it complained threatened it with a sufficient possibility of anticompetitive harm to support its entitlement to relief: "Excel's acquisition of Spencer would give it 20.4% of the entire input and output markets" the District Court defined; and, "[a]lthough Monfort will only suffer antitrust injury if Excel abuses its market power, the causal connection will exist if the ultimate injury materializes." Pet. App. 12a-13a.

SUMMARY OF ARGUMENT

In *Philadelphia National Bank* and other cases, this Court has held that an acquisition of one competitor by another is presumptively unlawful if the acquisition significantly increases concentration in the market in which the merging firms compete. The Court explicitly grounded that presumption on the concern that significant increases in concentration generally increase the likelihood that firms remaining in the market will be able to behave oligopolistically, thereby depressing output below and elevating selling prices above competitive levels. To be sure, increased concentration may present dangers other than those identified by the theory of oligopoly, and this Court's and lower court decisions show substantial variation both in applying *Philadelphia National Bank*'s presumption and in determining what factors can overcome it. But there is no question that in all Section 7 horizontal cases, the central inquiry has been whether, in the particular market the case involves, the increase in concentration a merger causes makes oligopoly pricing substantially more likely to occur. The Courts below lost sight of this inquiry both in determining that Excel's acquisition of Spencer Beef violated Section 7 and in determining that Monfort, a competitor, had demonstrated that the asserted violation threatened it with the "loss or damage" that Section 16 requires.

1. Section 16, interpreted in light of this Court's *Brunswick* decision, allows a private plaintiff to obtain injunctive relief against an acquisition only if he demonstrates both that the acquisition violates Section 7 and that the anticompetitive consequences that make the acquisition unlawful threaten him personally with harm. Here, the Courts below based a Section 7 violation on increased concentration and a consequent increased danger of oligopoly pricing. The District Court, however, grounded Monfort's injury on something completely different—"heightened competition" potentially threatening Monfort's competitive survival. The Court of Appeals grounded Monfort's injury on yet another theory. It concluded, in effect, that an increase in concentration sufficient to raise a danger of

oligopoly pricing automatically creates a possibility that the acquiring firm, at least if it has large resources, will be able to engage in unlawful predatory conduct. This possibility, the Court held, entitles the competitor to Section 16 relief.

These holdings are fundamentally inconsistent both with the realities of the marketplace and with the language and purpose of Section 16. A horizontal merger can injure a competitor in one of two ways. First, it may, as the District Court here found, increase the competition the competitor confronts, whether by allowing the merging firms to achieve efficiencies or otherwise. But if this is the merger's predicted consequence, the competitor-plaintiff necessarily fails to show antitrust injury, since increased competition in no way contributes to making an acquisition unlawful. Indeed, it suggests that the merger is not unlawful at all. Second, the merger may create a genuine risk of predatory conduct. If so, a competitor would be entitled to Section 16 relief, since a genuine risk of predation both contributes to making an acquisition unlawful and threatens the competitor with harm. But the one consequence of a horizontal merger that could *never* injure a competitor is an increased likelihood of oligopoly pricing, the consequence that the horizontal merger standards are designed to identify. Since such conduct necessarily involves coordination among competitors to the mutual advantage of all, it would help the competitor, not harm it.

The Court of Appeals, in effect, equated the third of these possibilities—oligopoly pricing—with the second—predation—despite Monfort's own contention that the first—heightened competition—was the consequence it feared. But the degree of market concentration sufficient to threaten oligopoly pricing among rivals is vastly lower than the concentration of market power in a single firm that could enable it to engage in predation. In fact, nothing in the record of this case suggests that Excel would have the kind of market power that makes a predatory strategy

remotely possible. By wrongly equating the conditions for oligopoly pricing and predation, the Court of Appeals inferred "antitrust injury" solely from an increased likelihood of oligopoly pricing, when the record demonstrated that what Monfort feared was not predation—and certainly not oligopoly—but "heightened competition" alone.

The holdings below are inconsistent with the antitrust laws' purposes. They allow competitors to challenge horizontal acquisitions even though what the competitors fear are procompetitive effects—a fear that contradicts the likelihood of oligopoly pricing on which the horizontal merger standards rest. It is no answer to say, as the Court of Appeals did, that in the end only mergers that offend those standards—*i.e.*, that threaten oligopoly pricing—will be enjoined. Section 16 requires the plaintiff to demonstrate that *he* will suffer loss from the acquisition's anticompetitive effects. Apart from this, the predictions Section 7 requires are difficult, and the tools available to make them imprecise. There is always a significant danger that a competitor's challenge will succeed in blocking an acquisition that promises to increase competition, rather than diminish it.

Heightened competition is the only possible injury that Monfort attempted to demonstrate or that the record suggests here. Because such injury is not antitrust injury—injury the antitrust laws were intended to prevent—the judgment below should be reversed.

2. In determining that the acquisition was unlawful, the Courts below equally failed to focus on Section 7's purposes. This Court's horizontal merger decisions employ market definition, concentration, entry conditions and other factors to determine whether an acquisition substantially increases the likelihood that a merged firm and its competitors will be able to engage in oligopoly pricing. The District Court ignored this inquiry. It defined markets merely by carving out narrow industry sectors (fed cattle

slaughterers and boxed beef producers) despite uncontradicted evidence demonstrating that the supply and demand responses of firms in immediately adjacent sectors (non-fed cattle slaughterers and non-boxed beef producers) would immediately constrain any attempt at oligopoly pricing. In considering entry conditions, it looked only to the likelihood of entry under present, intensely competitive market conditions, rather than to how likely entry would be—whether by new entrants or by firms in immediately adjacent industry sectors—if oligopoly pricing were attempted. In considering the significance of market shares, it again ignored the competitive constraint exerted by firms in immediately adjacent sectors as well as other factors, particularly the likelihood of output expansion by smaller firms, that substantially undercut the significance of market shares as predictors of oligopoly pricing.

On appeal, the Court of Appeals found all of the District Court's conclusions insulated from review by the clearly erroneous rule. But the errors asserted are not errors of fact. They are errors of analysis—failures to apply to the facts of this industry the principles contained in this Court's horizontal merger standards and a failure ultimately to determine whether the acquisition does or does not threaten "substantially to lessen competition" within the meaning of Section 7.

ARGUMENT

I. Monfort Failed To Establish Its Entitlement To Relief Under Section 16 Of The Clayton Act

Section 16 provides that "[a]ny person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." As this Court has held, Section 16 does not allow antitrust plaintiffs to act as private attorneys general; to obtain Section 16 relief a plaintiff must show not only that the act it seeks to enjoin violates the antitrust laws, but

that the violation threatens the plaintiff itself with a substantial likelihood of harm. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Moreover, although a plaintiff might be injured by heightened competition resulting from an acquisition that is unlawful on other grounds, Section 16 does not allow relief from competition. Instead, Section 16 requires that the "violation"—the acquisition's anticompetitive consequences—cause the plaintiff harm. Accordingly, the plaintiff must show "antitrust injury" as this Court defined it in *Brunswick*, 429 U.S. at 489—injury of the type the antitrust laws were intended to prevent. No such injury appears in this case.

A. A Plaintiff Suing Under Section 16 Must Meet *Brunswick's* Antitrust Injury Requirement

In *Brunswick*, the plaintiff bowling centers competed with other centers that, on the verge of going out of business, had been acquired and saved by a bowling equipment manufacturer. The plaintiffs asserted that the acquisition violated Section 7 on the ground that the manufacturer, with its substantial resources and supposedly attendant competitive advantages, might engage in improper conduct, and asked for treble damages flowing from the continued competition of the acquired bowling centers which, but for the acquisition, would have failed. 429 U.S. at 481-83. This Court assumed that the acquisition was unlawful and that the plaintiffs' damages would not have been suffered absent the acquisition. Nonetheless, it held that the plaintiffs were not entitled to damages under Section 4 because they were not, as that Section requires, persons "injured . . . 'by reason of anything forbidden in the antitrust laws.'" *Id.* at 488, quoting 15 U.S.C. § 15. Because the plaintiffs' injury bore "no relationship to the size of either the acquiring company or its competitors"—the factors creating the probability of future anticompetitive conduct that made the merger unlawful—the plaintiffs would have suffered the identical loss "had the acquired centers . . . obtained refinancing or been

purchased by 'shallow pocket' parents." *Id.* at 487. Hence, the plaintiffs' loss did not occur " 'by reason of' that which made the acquisitions unlawful." *Id.* at 488. Because the plaintiffs' loss would stem from competition, it would be "inimical to the purposes" of the antitrust laws to permit the plaintiffs to succeed in their claims. *Id.* The Court concluded:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489, quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969) (emphasis in original).

The essence of *Brunswick* is that the plaintiff's theory of injury must be congruent with its theory of antitrust violation, and cannot be established if the projected injury would result from competitive conduct. The principle is firmly established, and has been made a part of the elements an antitrust plaintiff must allege to survive a motion to dismiss even at the pleading stage. *E.g.*, *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

As most lower courts have held, the *Brunswick* principle applies to actions under Section 16 as much as to actions

under Section 4.[9] To be sure, Section 16 requires proof of "threatened loss or damage," not the actual losses needed to support relief in damages. Moreover, problems of apportionment and multiple recovery do not arise under Section 16. *See Associated General Contractors*, 459 U.S. at 540-45. But these differences in no way suggest that *Brunswick*'s antitrust injury requirement does not apply under Section 16, or, as the Courts below believed, applies only in some attenuated form. Just as Section 4 authorizes damage awards only to persons "injured . . . by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15, Section 16 authorizes injunctive relief only "against threatened loss or damage *by a violation of the antitrust laws*." 15 U.S.C. § 26 (emphasis added). Moreover, the policies underlying *Brunswick*'s analysis apply in full force to Section 16. Under Section 16 as well as Section 4, the *Brunswick* rule assures that the antitrust remedies will be applied only when the plaintiff's assertions of harm to itself correspond to the substantive purposes of the law, thus preventing the distortion of the remedies and of the antitrust prohibitions themselves to anticompetitive ends.

Such a distortion is clearly threatened when a competitor attempts to invoke Section 16 to prevent a merger of its rivals. A competitor faced with a merger that would create efficiencies or otherwise make the merged rival a more effective competitor has a powerful incentive to challenge the proposed transaction. The incentive, however, is not to protect competition, but to avoid it. As Professors Baumol & Ordover put it in discussing Chrysler Corpo-

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[9] *E.g.*, *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, No. 85-1481 (7th Cir. Mar. 4, 1986) (available March 25, 1986, on LEXIS, Genfed library, Cir file); *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 452-53 (8th Cir. 1985); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980); *Cf. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357-58 (6th Cir.), *cert. dismissed*, 105 S. Ct. 1155 (1985).

ration's suit against the General Motors-Toyota joint venture:

> This sort of opposition is predictable and in a manner that is rather ironic it can signal clearly the likely effects of the joint venture. If the enterprise were in fact likely to acquire monopoly power and charge excessive prices, other U.S. auto firms undoubtedly would benefit from the resulting protective umbrella, which would enable them to raise their prices as well. If this is the probable outcome, then those rivals can be expected to view the joint venture with equanimity and silent acquiescence. But if the joint venture really is likely to introduce economies or improve product quality, it is sure to make life harder for the domestic rivals of the participants who will then have to run correspondingly faster in order to stand still.

Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 256-57 (1985).

The Court of Appeals acknowledged the possibility that competitors might challenge procompetitive acquisitions, but concluded that, in the end, only anticompetitive acquisitions would be enjoined. Indeed, the Court seemed to think that once a violation has been found, the kind of injury the competitor has pointed to need be of little concern. It therefore trivialized the statutory requirement by hypothesizing a possibility of predation in any concentration-increasing merger.[10] This approach both offends the statutory scheme by giving relief to those who are not entitled to it, and also encourages competitor litigation of a kind that will defeat, rather than serve, the antitrust law's purposes.

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[10] *See, e.g.*, Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1471-73 (1985).

Absent a requirement that a plaintiff clearly allege and subsequently demonstrate antitrust injury, companies considering efficiency-enhancing mergers may well be deterred from undertaking them by the likelihood that the merger's very efficiency-enhancing characteristics will generate competitor suits to prevent it—suits that inevitably will impose substantial costs and the risk of delay. Because Section 16 involves predictions of future harm, a competitor-plaintiff, bent on preventing an efficiency-enhancing merger and unbound by what in fact has occurred, readily can allege a "plausible theory" of the kind the Court of Appeals found sufficient here. If the competitor can survive dismissal, it may well succeed in achieving its anticompetitive objective. Preliminary injunctions are necessarily considered on truncated records, and are often granted generously because of the difficulty of unscrambling a consummated transaction. There can be no confidence, therefore, that only genuinely anticompetitive acquisitions will be preliminarily enjoined and thus delayed, and delay will often kill the transaction.[11]

Indeed, even when a full trial on the merits is possible, it cannot be supposed that the correct results—results that protect the competitive process—always will be reached. Section 7 requires predictions about future economic performance that, except in the most extreme circumstances, are at best uncertain. The economic tools available are far too inexact and information about market performance far too imperfect to give confidence that only anticompetitive acquisitions will be caught in Section 7's net. The law requires that the risk of error be run. But application of

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[11] *E.g.*, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 854, 870 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act—Policy and Law* 32-33 (1977). *See also* Austin, *Negative Effects Of Treble Damage Actions: Reflections On The New Antitrust Strategy*, 1978 Duke L.J. 1353, 1363.

the antitrust injury requirement assures that it will be run only at the instance of a plaintiff genuinely threatened by the anticompetitive consequences of the violation alleged, not at the instance of a plaintiff who, while asserting that the acquisition is anticompetitive, in fact fears that it will increase the competition it confronts.

Finally, there is no reason to suppose that the antitrust injury requirement needs to be relaxed or ignored in order to assure that Section 7 will be enforced. Any acquisition that poses a genuine threat to competition under applicable substantive standards can be challenged by the Department of Justice, the Federal Trade Commission or any of the private parties—whether suppliers, customers, or competitors—whose interests genuinely are threatened by the harm to competition that they assert makes the acquisition unlawful. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

As in damages actions, therefore, a Section 16 plaintiff should be required to allege and subsequently to show that he is threatened with injury "of the type the antitrust laws were intended to prevent." The question is not, as the Court of Appeals seemed to assume, merely one of pleading. Even if a plaintiff establishes a violation, he equally must establish his right to relief. Here Monfort has had a full opportunity to introduce evidence on the question of antitrust injury, and the entire record is before the Court for a determination of that question. As the record reveals, Monfort failed to show antitrust injury.

B. Monfort Established No Injury From The Acquisition Other Than What Might Result From Increased Efficiencies and Greater Competition

Monfort contended, and the lower courts concluded, that the Spencer Beef acquisition violated Section 7 under the horizontal merger standards, and consequently on the basis of the increased likelihood of oligopoly pricing that those standards are designed to predict. But oligopoly pricing

could not possibly injure a *competitor*. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, No. 83-2004, slip op. at 7-8 (U.S. Mar. 26, 1986). As a participant in the markets the lower courts defined, Monfort would benefit from the reduced prices for fed cattle and increased prices for boxed beef that oligopoly pricing would cause. Pet. App. 7a.

Perhaps because of this, Monfort told a different story in its effort to show that the acquisition threatened it with injury. In the District Court, Monfort rested its theory and proof of injury on Mr. Monfort's prediction that, after the acquisition took place, Excel and IBP each would seek to increase its market share and, in so doing, would reduce its profit margin, paying somewhat more for cattle and selling its beef products for somewhat less. As a result of this "cost-price squeeze," Mr. Monfort suggested, some of the "smaller" or less efficient members of the industry, conceivably including Monfort itself, would suffer losses and ultimately be forced out of business. J.A. 286.

Apart from *Brunswick's* "antitrust injury" requirement, a Section 16 plaintiff must show at least that the harm it asserts is likely to result from the act that it claims is unlawful. As presented in the District Court, Monfort's injury theory failed to meet even this initial causation requirement. Its theory, to be sure, speculated that it might be harmed, but it altogether failed to explain how the challenged acquisition made that harm substantially more likely to occur. Mr. Monfort attributed the "cost-price squeeze" he feared to the desires of IBP and Excel respectively to be the number one firm in the industry and to the large resources of those companies. J.A. 275, 285. But those desires and resources would neither be created nor reinforced by the acquisition of Spencer Beef. Mr. Monfort conceded that IBP and Excel already were "each seeking aggressively to increase their market shares." J.A. 286. And those companies' "resources," reflecting the size of their corporate parents, would be just as substantial

whether or not Excel bought Spencer Beef. In fact, Mr. Monfort acknowledged that the "cost-price squeeze" he hypothesized was nothing more than the continuation—albeit in "heightened" form—of the intense competition that had existed in the industry for two decades. J.A. 286-87.

In the Court of Appeals, Monfort attempted to bolster its effort to demonstrate a causal link between the acquisition and the greater cost-price squeeze it predicted. Its Response Brief again asserted that Excel's increased capacity would cause the cost-price squeeze to accelerate, but it also pointed to evidence that the acquisition would allow Excel to achieve multi-plant scale efficiencies that Monfort did not have. As thus elaborated on appeal, Monfort's theory does indeed suggest a causal link between the acquisition and an accelerated cost-price squeeze. But both as originally presented and as elaborated, Monfort's theory fails to meet *Brunswick*'s antitrust injury requirement. Instead of flowing "from that which makes the acquisition unlawful," Monfort attributed the cost-price squeeze it feared, and from which alone its possible harm purported to stem, to competition, rather than to any anticompetitive act that the acquisition might make possible.

In stating that the "cost-price squeeze" had existed in the industry for 20 years, Mr. Monfort was simply characterizing competition by another name.[12] The District Court thus correctly summarized Monfort's injury claim:

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[12] Mr. Monfort testified:

Q: Now by price squeeze did you mean a narrowing of the margin or profit in each market?

A: Narrowing of the margin, yes.

Q: And these profit narrowing results have been the result of competition, haven't they?

A: Yes, sir.

J.A. 287.

> Monfort contends that it will be driven out [of business] *by the impact of heightened competition between Excel and IBP in their quest for increased market share.*

Pet. App. 70a (emphasis added). Moreover, if Excel's achievement of increased efficiencies is the source of Monfort's harm—and it is the only source suggested on the record of this case—it even more plainly fails to meet *Brunswick's* requirement. A competitor will never welcome the achievement of efficiencies by his rivals. Efficiencies lower costs, and in a competitive market these lower costs will result in higher output and lower prices to consumers. F.M. Scherer, *Industrial Market Structure and Economic Performance* 13-14 (2d ed. 1980). Efficiencies thus unquestionably contribute to a "cost-price squeeze" of exactly the kind Monfort predicted, and may ultimately lead rivals to withdraw less efficient facilities from the market. But the achievement of efficiencies, however unwelcome to competitors, in no way contributes to making an acquisition unlawful. *E.g., Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357 (6th Cir.), *cert. dismissed*, 105 S. Ct. 1155 (1985). To the contrary, greater efficiencies and the benefits they afford consumers are procompetitive and entirely consistent with the antitrust laws' purposes. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 (1984).

Far from establishing "antitrust injury," Monfort's theory and evidence demonstrated, at most, potential harm from competition and from the increased efficiencies that contribute to it. As in *Brunswick*, therefore, "the antitrust laws are not merely indifferent to the injury claimed here." Because, like the plaintiffs in *Brunswick*, Monfort seeks to be protected from competition, it would be "inimical to the purposes of the antitrust laws" to grant it relief based on the theory and proof of injury it presented and on which alone it relied.

C. No Genuine Risk of Predation Supports Monfort's Entitlement to Relief

As the District Court observed, Monfort did not contend or attempt to show that as a result of the acquisition, "predatory practices would be engaged in by Excel or IBP." Pet. App. 32a. Excel consistently has acknowledged that if a competitor establishes that an acquisition genuinely threatens to enable the merged firm to engage in predatory conduct, the competitor would have a right to Section 16 relief. JA 436-40. But Monfort did not purport to make any showing that the "cost-price squeeze" it described would be predatory. To the contrary, it consistently characterized it as competitive.

Despite this, the Court of Appeals grounded Monfort's antitrust injury on what it called a "plausible theory" that the acquisition might enable Excel to engage in what the Court "consider[ed] to be a form" of predation. Pet. App. 8a-9a. The Court of Appeals appears simply to have assumed that if a horizontal acquisition, at least by a "deep pocket" firm, increases market concentration sufficiently to violate Section 7's horizontal merger standards, it creates some possibility that the acquiring firm will be able to engage in predatory conduct,[13] and this possibility, the Court held, is sufficient in itself to establish a competitor's entitlement to Section 16 relief.

In fact, however, the increased market shares and other conditions sufficient to threaten oligopoly pricing cannot be equated to the single firm market power that creates a genuine risk of predation. What constitutes "predation," what distinguishes it from competition, and whether it occurs often enough to worry about are much disputed.[14] But whatever the precise definition of predation might be, there is general agreement that no rational firm would attempt it unless it could (1) drive down market prices and thus ruin all or most rivals; and then (2) recoup the losses thus suffered by raising its prices to monopoly levels. *E.g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); III P. Areeda & D. Turner, *Antitrust Law* ¶ 711 (1978). Because of this, predation is a credible possibility only in market conditions different from, and far more extreme than, those that may enable firms collectively to engage in oligopoly pricing. First, in order to drive rivals out of business, the would-be predator must have enough capacity to supply all, or at least most, market demand; otherwise, he can cut price to the bone and a number of rivals will still exist, filling the market demand that the predator cannot fill, and doing so at presumably profitable prices. *Matsushita*, slip op. at 15. Accordingly, a would-be predator must have a very high share of market capacity before it can be assumed that predation is a genuine risk.[15] Second, the ability to recoup losses requires, at a minimum, high entry barriers that will blockade entry for a substantial period of time, since entry will tend to drive prices back to competitive levels and prevent the predator from recovering his earlier losses. *Id.*

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[13] Having assumed that predation was a "plausible theory," the Court's opinion noted that Monfort would only be harmed by "sustained predatory pricing," as opposed to predation engaged in only for a "short time." Pet. App. 9a. The Court acknowledged that "[i]t is impossible to tell in advance of the acquisition which situation would occur, *if either*." *Id.* (emphasis added).

[14] *Compare, e.g.*, *Transamerica Computer Co. v. IBM, Corp.*, 698 F.2d 1377 (9th Cir.) *cert. denied*, 464 U.S. 955 (1983) (prices "above total cost" may be predatory) *with Northeastern Telephone Co. v. AT&T Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (prices are not predatory unless below "marginal cost"). *See also* Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105 (1971); McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289 (1980).

[15] *See, e.g.*, Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 292 (1977) (60 percent share necessary); Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978) (60 percent figure too low).

Contrary to the Court of Appeals, nothing in the record of this case suggests that predation is "plausible" here, much less that the acquisition creates a genuine risk that predation could occur.[16] Even in the narrow markets defined by the District Court, Excel's post-acquisition market share would come to only 20.4 percent—far below that giving any possibility that Excel could flood the market and depress market price. Moreover, even if Excel could succeed in ruining all or most rivals, the record establishes that it would have no hope of recouping its losses. The lower courts found that new entry was not likely in the boxed beef business as it now exists. But driving rivals out of business necessarily would leave substantial unused capacity in the beef industry—capacity available to entrants in the event Excel tried to reap monopoly profits.[17] Thus, the lower courts' findings with respect to entry barriers simply do not indicate an ability to recoup the losses suffered in a predation campaign's initial stage.[18]

D. Summary

Monfort's theory and proof of injury rested solely on a fear that the acquisition, because it would allow increased efficiencies or otherwise, would increase competition. The injury it purported to show thus is not, under *Brunswick*, "injury of the type the antitrust laws were intended to

[16] The Court of Appeals' reference to Cargill's "deep pocket," Pet. App. 20a, is relevant to this point. But while financial "staying power" may be necessary if a predator is to outlast its rivals, it is insufficient, in itself, to make predation a realistic possibility.

[17] The record contains undisputed evidence that shut-down beef packing plants could be started up again relatively easily if increased profits made such a course desirable. J.A. 95, 97-98, 192.

[18] The ability to recoup such losses also is undercut if product demand is more rather than less elastic. Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553, 557 (1983). Because of the narrow markets defined by the courts below, however, there necessarily are close substitutes for the products within those markets, limiting the ability of a boxed-beef monopolist to raise price.

prevent." 429 U.S. at 489. Nor does the record allow an inference of antitrust injury under the Court of Appeals' predation theory. Far from being "plausible," the theory is contradicted here both by Monfort's own disclaimer and by undisputed facts of record demonstrating that the acquisition raises no genuine threat of predation by Excel. The Court of Appeals' assumption that increased concentration and a "deep pocket" alone give rise to such a threat is simply wrong. Moreover, it invites exactly the distortion of the antitrust laws to anticompetitive ends that the *Brunswick* rule prevents. Accordingly, the Court of Appeals' theory that the cost-price squeeze might be predatory cannot substitute for the antitrust injury Monfort itself failed to show.

II. The Standards Employed By The Courts Below For Defining Markets and Evaluating The Competitive Effects Of The Proposed Acquisition Are Inconsistent With the Purpose Of Section 7.

This Court's more recent Section 7 decisions have underscored the importance of keeping the Section 7 inquiry in touch with the statutory purpose—to prevent those mergers that threaten substantially to lessen competition. Thus, while it has reaffirmed that high market concentration may make oligopoly pricing more likely, the Court has warned that market share statistics "can be unreliable indicators of actual market behavior," *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974), and may give "an inaccurate account of the acquisitions' probable effects on competition," *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975). In *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-96 (1974), the Court repeated *Brown Shoe*'s caution that high market share statistics "[are] not conclusive indicators of anticompetitive effects," and held that the District Court properly had given weight to the long-term contracts that characterize the coal industry in concluding that the

merger, despite the market shares, did not violate Section 7. *Id.* at 498.

In short, although it is proper "to simplify the test of illegality" by employing, for example, presumptive rules concerning market shares, this should be done only when those rules do not "d[o] violence to the congressional objective embodied in § 7." *Philadelphia National Bank*, 374 U.S. at 362. Accordingly, all of the subsidiary steps of horizontal merger analysis—market definition, market shares, consideration of other factors that aggravate or undercut the shares' significance—must be directed toward determining whether the acquisition threatens to lessen competition by making monopoly or oligopoly pricing substantially more likely to occur.

The District Court here purported to apply this Court's horizontal merger standards, but it did so in ways that lost sight of this central inquiry. The federal courts generally have recognized that competition from firms that do not produce the merged firm's product at prevailing, competitive prices, but could do so if those prices rose, must be considered in determining whether the merged firm and its immediate rivals could engage in oligopoly pricing. Some courts, in both Section 7 and Section 2 cases, have accounted for this competition by defining markets to encompass the various producers to which customers could turn or whose responses constrain the ability of the merging firm and its immediate rivals to engage in oligopoly pricing. *E.g.*, *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366-68 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 916 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). Other courts have accounted for such competition, especially when they have defined markets narrowly, by considering the ease with which entry can occur, because the merged firm and its immediate rivals could engage in oligopoly pricing only if barriers prevent competition either from existing firms in immediately adjacent industry segments, or from new firms that would be attracted by the market's supra-competitive profits. *E.g.*, *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984); *United States v. Calmar, Inc.*, 612 F. Supp. 1298 (D.N.J. 1985). *See also Echlin Manufacturing Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,268 (FTC June 28, 1985).

The District Court here used neither approach. Its market definitions failed to take into account the supply and demand forces in the beef industry—particularly the responses of non-fed cattle slaughterers and non-boxed beef fabricators—that constrain any effort by Excel, Monfort and others to behave oligopolistically. In considering entry, it again ignored these potential responses, instead focusing exclusively on the likelihood of *de novo* entry into the industry under prevailing, intensely competitive conditions. In consequence, the concentration figures the District Court calculated fail to indicate that the acquisition would significantly increase the likelihood of oligopoly pricing. Moreover, despite this Court's teaching in *General Dynamics*, the District Court simply ignored other factors—particularly the likelihood of increased production by smaller beef firms—that substantially undercut the inference of possible oligopoly pricing from market share figures alone.

In short, in its Section 7 analysis, the District Court asked the wrong questions, and consequently reached answers unconnected to the purposes of Section 7. On appeal, the Court of Appeals held that all of these failures were insulated from review by the clearly erroneous rule. But the errors are not errors of fact. They are errors in understanding and applying the basic economic and legal principles embodied in this Court's horizontal merger decisions—principles that determine which facts are relevant to the inquiry Section 7 requires and which are not. As such, they were errors that the Court of Appeals both

could and should have corrected, and are properly subject to review by this Court.

A. Market Definitions

The purpose of market definition is to define the "area of effective competition"—*i.e.*, to identify those firms, in terms of the products they produce and where they produce them, whose independent price and output decisions affect the competitiveness of the market in which the merging firms participate. *E.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). *See also Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Put another way—a way that directly addresses the oligopoly problem that underlies this Court's horizontal merger standards—the market definition question is this: If the merging firm and its immediate rivals attempted to engage in oligopoly pricing, what other firms would they have to get to go along? So understood, relevant markets must comprise those firms that currently produce the particular version of the merged firm's product, firms that produce close substitutes for it, and firms in immediately adjacent industry sectors that could readily produce the product or close substitutes if oligopoly pricing made it attractive to do so. *E.g.*, *Yoder Bros.*, 537 F.2d at 1366-68; *Telex Corp.*, 510 F.2d at 916. The District Court failed to apply these concepts here.

1. The Market for the Purchase of Cattle

In confining the buying market to those firms in a twelve-state region that currently purchase fed cattle,[19] the District Court relied principally on the following facts: (1) most fed cattle are purchased within 200 miles of the

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[19] The region consists of Nebraska, South Dakota, southern Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kansas, eastern Colorado and the panhandle region of Oklahoma, New Mexico and Texas. Pet. App. 47a.

slaughter plant; (2) the cost of transporting cattle is high relative to current sales margins; (3) slaughter facilities outside the twelve-state area purchase only 26 percent of all fed cattle anyway; and (4) non-fed slaughter facilities are generally less efficient in slaughtering fed cattle than fed cattle slaughter facilities. Pet. App. 42a-51a. These facts are correct, but they do not establish that fed cattle purchasers within the twelve-state region constitute a "relevant market" for purposes of determining the competitive consequences of this acquisition.

In considering the buying market question, the District Court failed to keep in mind the economic understanding of how oligopolistic conduct on the buying side would have to work. Fed cattle buyers could depress cattle prices below present competitive levels only if they reduced the volume of their purchases and consequently their output of boxed and carcass beef. For Section 7 purposes, the critical question is what would happen if this occurred — *i.e.*, to whom could sellers of fed cattle and purchasers of beef turn in order, respectively, to sell the fed cattle they have produced and to obtain supplies of beef?

The factors on which the District Court relied to define the "relevant market" simply do not address this question. Local procurement patterns, by themselves, provide no answer. *RSR Corp. v. FTC*, 602 F.2d 1317, 1322-23 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). Whether a competitive market is local, regional or even national in scope, purchasers faced with roughly equal prices at all locations will seek to minimize transportation costs. The District Court thus correctly concluded that local procurement does not necessarily suggest local markets. Pet. App. 48a-49a. But it nowhere explained why local procurement supports a market of over one thousand miles in length and breadth, encompassing Monfort's and Spencer Beef's plants to the north and Excel's plants 400 or so miles to the south, but at the same time requires excluding plants no more distant to the east. No geographic

barrier exists between plants inside and those at least to the east of the twelve-state area; accordingly, Excel's experts testified that no such artificial boundary can be drawn. J.A. 112-19, 181-86. Fed cattle prices, inside and outside the twelve-state area, tend to be uniform, and for good reason: they respond to the same supply and demand forces—in particular, to the demand of at least all slaughterers east of the Rockies.[20] J.A. 117, 130-32, 376-77, 577-78, 601-02.

The District Court concluded that fed cattle would continue to be sold only within the borders of the twelve-state area because transportation costs, while "not as great per mile after the first 150-200 miles . . . are still high in proportion to the relatively small profit margins in this industry." Pet. App. 50a. But the relevant inquiry under Section 7 is whether it would become profitable for cattle sellers to transport cattle outside of the area if, as a result of oligopsonistic conduct, the prices they were receiving fell below competitive levels. Excel presented witnesses, including two cattle sellers, who testified that if fed cattle prices were depressed, sellers would seek purchasers outside of their normal sales areas. J.A. 376; Pl. Ex. 80 at 6-8; Pl. Ex. 82 at 6-7. The District Court did not reject this testimony. It simply found it irrelevant to what it

[20] The Excel documents the District Court relied on in concluding that there are regional price variations refers only to price variations *within* the twelve-state market it defined—*i.e.*, between the "western Cornbelt" and the "High Plains" area of Kansas and the Texas panhandle. Indeed, if the District Court were right in attaching significance to these price variations, they would suggest that the western Cornbelt and the High Plains are themselves separate markets, in which event there would be little competitive overlap between Excel and Spencer in the purchase of fed cattle. But the Court was not right. The Excel documents it refers to do not discuss persistent regional variations in price, but the likelihood that, in the long-run, cost advantages may lead to greater concentration of cattle feeding in the Cornbelt—the principal reason Excel sought to purchase facilities in that area. Pl. Ex. 4 at 1-3; Pl. Ex. 5 at 1-2; Pl. Ex. 24 at 5; Pl. Ex. 30 at 6-8.

believed to be the proper inquiry—*i.e.*, what individuals and firms "*actually* do," in intensely competitive conditions, "as opposed to what they *could* do," if oligopoly pricing occurred. Pet. App. 44a (emphasis in original).

Even if transportation costs did not prevent fed cattle from being sold outside of the twelve-state area, the District Court reasoned, slaughter facilities outside of the area account for only 26 percent of all fed cattle sold. Pet. App. 51a. Apparently the Court assumed that most—if not all—fed cattle would have to be sold outside the area in order to influence fed cattle prices within the twelve states. But this is plainly not the case. So long as a significant number of cattle could be sold outside the area, the supply within the twelve states would be reduced, forcing prices in that area to return to competitive levels. *See, e.g., Yoder Bros.*, 537 F.2d at 1366-68; Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553, 558 (1983). That slaughterers located outside of the twelve states have the capacity to handle one-fourth of the fed cattle currently sold is ample evidence that a significant number of additional cattle could be sold to firms outside of the twelve states if those within it reduced their purchases in order to depress prices.

The District Court made a similar error when it concluded that the relevant product market should be confined to those firms that currently slaughter fed cattle because it "would not be cost effective" for non-fed cattle slaughterers to switch to fed cattle. Pet. App. 45a. Specifically, the Court found that non-fed cattle slaughter plants tend to lack the scale economies of their fed cattle counterparts, and thought this important "because of the relatively low profit margin in the beef industry." *Id.* The Court also found that those plants generally lack fabrication facilities, and thought this important because "transporting carcass beef is uneconomical compared to transporting boxed beef."[21] Pet. App. 46a.

[21] IBP, Excel and Spencer, however, all have fed cattle slaughter

Their relative efficiency in non-fed cattle slaughter says nothing, however, about whether non-fed slaughter facilities are "functionally interchangeable" with fed cattle facilities or whether non-fed cattle slaughterers would purchase fed cattle if the relative price of fed cattle dropped. By limiting its inquiry to what non-fed cattle slaughterers "actually do" in today's competitive beef industry, instead of what they "could do" when faced with non-competitive fed cattle prices, the District Court simply regarded as irrelevant Excel's evidence (1) that there is little or no physical difference between fed and non-fed cattle slaughter facilities, and (2) that non-fed cattle slaughterers would begin purchasing and slaughtering fed cattle in substantial amounts if, as a result of fed cattle purchasers' oligopsonistic conduct, the price of fed cattle significantly dropped. J.A. 92-93, 178-80.

2. The Market for the Sale of Beef

In confining the relevant market for the sale of beef to a "submarket" consisting of integrated slaughterer-fabricators and independent fabricators that currently produce boxed beef, the District Court relied principally on the following points: (1) consumers do not regard ground beef as a substitute for the products produced from boxed beef; hence, non-fed cattle fabricators must be excluded; (2) the total cost to a retailer of producing beef cuts for sale to consumers is typically lower for boxed beef than it is for carcass beef; hence, carcass beef producers must be excluded; and (3) retailer-owned fabrication facilities are typically less efficient than their independent counterparts and do not sell beef to other retailers or institutions; hence, retailer-owned fabricators must be excluded. Pet. App. 51a-60a. Excel disputes neither the facts on which the District Court relied nor the Court's findings that there

capacity that either lacks significant scale economies or is not integrated with a fabrication facilities. J.A. 341, 345; Pet. App. 27a. Yet the District Court included that capacity in its relevant product market.

has been a trend toward boxed beef and that most beef sold today is shipped in a box. What Excel does dispute is that independent and integrated producers of boxed beef constitute a "relevant market" for antitrust purposes.

Granting that ground beef is not a perfect substitute for boxed beef, the evidence showed that ground beef fabricators could readily shift to the production of boxed or unboxed beef, and would do so if the price of boxed beef rose above competitive levels. J.A. 92-93, 171-72. In connection with this, the District Court reiterated its finding that those facilities do not currently fabricate fed cattle because they lack certain economies of scale. Pet. App. 58a. Again, while this is true, the evidence showed that the cost disadvantage associated with size differential would be offset if boxed beef prices rose significantly. *Id.*

The District Court also correctly observed that, although boxed beef prices are higher than carcass beef prices, many purchasers of boxed beef save more than the price differential in the form of reduced labor and other costs. Pet. App. 54a-55a. But this says nothing about whether the two forms of beef compete. Boxed beef is, after all, merely a carcass cut into smaller pieces; to the ultimate consumer, the end results are identical. Pet. App. 54a. As the District Court found, even under the competitive conditions that now prevail, 28 percent of fed cattle are sold as carcasses and fabricated by the retailer. In short, the cost advantage of boxed beef is not absolute, but varies among purchasers, who themselves are competing for sales to consumers. Beef purchasers testified at trial that, under these circumstances, even a small increase in the relative price of boxed beef would cause them to switch at the margin to carcass beef. J.A. 596-97; Pl. Ex. 7R at 14-15. Again, the point was not that all purchasers would switch. Instead, it was that if boxed beef sellers attempted to engage in oligopoly pricing, enough purchasers would switch enough of their purchases to lower the aggregate demand for boxed beef substantially, thereby forcing boxed beef prices back to

competitive levels. *See, e.g., General Business Systems v. North American Phillips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983). The District Court did not discredit this evidence; it simply viewed it as irrelevant to what it perceived to be the central inquiry—what type of beef is primarily sold today. It did so, moreover, despite the undisputed evidence that the market prices of boxed and carcass beef move in perfect synchrony—the strongest possible indicator that they respond to identical supply and demand forces and that they are, economically and legally, in the same market. Tr. 493-95; Def. Ex. 7O.

Finally, the District Court made the same error in excluding retailer-owner fabrication facilities from the relevant market. While it is true that these facilities "inherit the inefficiencies associated with carcass beef," many continue to operate. Pet. App. 29a, 56a. Retailers that own fabrication facilities testified at trial that they would increase their production, and reduce their boxed beef purchases, if boxed beef prices rose. J.A. 596-97; Pl. Ex. 7R at 14-15. Although the District Court accepted this evidence, it reasoned that such production would not have an impact on boxed beef prices because captive fabricators do not sell to other retailers and institutions. Pet. App. 56a. But additional production by retailers with fabrication facilities would reduce *their* demand for boxed beef. As other federal courts have recognized, captive production necessarily affects aggregate demand for, and hence the market price of, a product. *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).[illegible] Since this is so, the response of retailers with captive capacity necessarily would constrain any effort by boxed beef producers to engage in oligopoly pricing.

The Court of Appeals did not discuss these arguments except to say that the District Court's findings were not

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[illegible] *Accord ITT Corp. v. GTE Corp.* 518 F.2d 913, 930 (9th Cir. 1975); *United States v. Amax, Inc.*, 402 F. Supp. 956, 962-63 (D. Conn. 1975).

clearly erroneous. The arguments, however, addressed not the facts the District Court found, but the standards it employed in determining the facts' legal significance. The federal appellate courts have recognized that errors of exactly the kind made by the District Court in this case are proper grounds for reversal of antitrust judgments. In *Telex*, for example, the Tenth Circuit itself reversed the District Court's exclusion of manufacturers of non-IBM plug compatible peripheral products from the relevant market, principally because those firms would manufacture IBM plug compatible products if "the economic rewards in the realities of the market become sufficiently attractive."[illegible] 510 F.2d at 916. The Court of Appeals erred in not reaching the same result here.

B. Entry Conditions

The courts have recognized that the ease or difficulty of entry into markets is relevant to the Section 7 inquiry because, when entry is relatively easy and quick, its threat will constrain any oligopoly pricing effort; conversely, if entry is difficult, oligopoly pricing will be more profitable and, hence, more likely to occur. For these reasons, as pointed out above, where firms in adjacent sectors could easily and quickly produce the products of the merged firms, many courts have included such firms in the relevant market. When firms in adjacent sectors have been excluded, the courts have considered their ease of entry in weighing the significance of concentration in the narrow markets they have defined. The District Court here did neither. Having defined the markets to exclude firms in immediately adjacent sectors, it altogether ignored the potential responses of such firms in considering entry conditions. Instead, it considered as relevant to the Section

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[illegible] *Accord ITT Corp.*, 518 F.2d at 930-34; *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271-72 (9th Cir. 1975), *cert. denied*, 459 U.S. 1009 (1982).

7 inquiry only the ease and likelihood of entry by "new" firms.

Even in considering new entry, the Court failed to address the relevant Section 7 question: Would such entry be likely if profits in the defined markets rose to supra-competitive levels? *E.g.*, *Waste Management*, 743 F.2d at 983. The District Court concluded that the $20 to $40 million of capital and twelve to eighteen months required to build a new plant were "formidable barrier[s] to new entrants" given the "low profit margins" in the industry.[24] But this says nothing about whether entrants would make the necessary investment if current purchasers of fed cattle and fabricators of boxed beef attempted to engage in oligopoly pricing, and profit margins rose.[25] Moreover, while time requirements may pose a barrier, some authorities do not regard time requirements of the magnitude the District Court found here as significant. *E.g.*, *Echlin*, 3 Trade Reg. Rep. (CCH) at 23,302.

In any event, time poses a much less significant barrier to those entrants who acquire and expand existing facilities. Although the District Court concluded that such entry was unlikely, it did so based solely on an Excel document that, the Court thought, identified the Spencer Beef plants as the "only viable integrated facilities available within the twelve state procurement market." Pet. App. 66a. But that document addresses only the availability and attractiveness to Excel of existing facilities in the western Cornbelt, which encompasses portions of only three of the states included in the District Court's "twelve state market." In fact, the evidence showed that unused plants were available for purchase and expansion elsewhere. J.A. 91, 97; Pl. Ex. 29 at Ex. III; Pl. Ex. 31 at 1. Moreover, the District Court's view that such plants would not provide viable means of entry because they will require "refurbishing" again ignores the purpose of evaluating entry conditions under Section 7. The question is not whether firms will choose to refurbish plants under highly competitive conditions, but whether they would do so when faced with supra-competitive profits. This the District Court never addressed.[26]

[24] In so finding, the District Court implicitly acknowledged what Excel had argued—that capital costs, in and of themselves, typically do not constitute a barrier to entry. II P. Areeda & D. Turner, *Antitrust Law* ¶ 409e (1978). As the Excel document the Court relies on illustrates, whether a new entrant can raise the capital to enter an industry depends in large measure on whether the entrant expects an adequate return on that investment.

[25] Contrary to the District Court's apparent view, the low *sales* margins that currently characterize the beef industry do not mean that the industry is unprofitable. Despite sales margins that ranked it 427th in that category in the 1985 "Fortune 500," Monfort ranked 80th in return on stockholder's equity, earning 19.3 percent. Fortune, April 29, 1985 at 274-75. *See also* Pl. Ex. 18 at 7.

Finally, the District Court thought it significant that there has been "just one major entrant into the two relevant markets in recent years, the Val-Agri Company." Pet. App. 66a. But as the Federal Trade Commission recently pointed out:

> The absence of past entry . . . does not prove the existence of entry barriers because it is equally consistent with alternative explanations, such as a declining industry or competitive prices.

Echlin, 3 Trade Reg. Rep. (CCH) at 23,303. By inferring the existence of barriers to entry from a supposed absence of significant entry in the highly competitive conditions of recent years, the District Court again failed to consider

[26] The District Court also suggested that high market concentration might pose a "psychological barrier" that would deter firms from building new plants or refurbishing old plants. Pet. App. 66a. But the Excel document that the Court relied on for this proposition says nothing about concentration; to the contrary, it suggests that new entrants might be deterred because the beef industry is intensely competitive. Pl. Ex. 16 at 7.

whether new entry would be likely in response to oligopoly pricing by existing firms. In fact, the unrefuted testimony of Excel's expert witness, based on forty years' experience, showed that in response to such conduct entry would be both likely to occur and reasonably rapid. J.A. 91-95, 189-94.

These are the arguments Excel presented to the Court of Appeals. The Court believed that these arguments reflected only Excel's "own view about the economic realities of the industry," which "Excel repeatedly characterize[d] as 'highly competitive.'" Pet. App. 16a-17a. But Monfort itself admitted and the District Court explicitly found that the industry today is competitive. J.A. 282; Pet. App. 27a. Moreover, the District Court did not discredit Excel's expert testimony about the likelihood of new entry if, as a result of oligopoly pricing, profits in the industry rose significantly. It simply regarded it as irrelevant to the question it framed—whether new entry was likely under highly competitive market conditions. In doing this, as well as in ignoring the high probability of immediate entry by non-fed cattle slaughterers and non-boxed beef producers, the Court applied the wrong legal standard to the question of whether entry would constrain any attempt by firms in the beef industry to engage in oligopoly pricing. The Court of Appeals equally erred in concluding that the District Court's analysis was insulated from review by the clearly erroneous rule.

C. Other Factors

Although ease of entry has particular importance, a variety of other market factors can impede oligopoly pricing. In *General Dynamics*, this Court recognized that at least those economic factors that clearly and significantly affect the likelihood that the relevant market will continue to perform competitively must be considered as part of the Section 7 inquiry. 415 U.S. at 498, 503-04. In particular, *General Dynamics* requires that account be taken of factors indicating that market concentration figures substantially overstate the leading firms' control over market output and price.

Here, the Courts below considered only one "other factor," the financial resources of Excel's parent Cargill, concluding that those resources would enhance the likelihood of predatory conduct. Neither court said anything more. Large assets, however, have nothing to do with whether the merging firms themselves have sufficient control over production to monopolize the industry or with whether a horizontal merger creates or reinforces a likelihood of oligopoly pricing. *See, e.g.*, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865-66 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); V P. Areeda & D. Turner, *Antitrust Law* ¶ 1135 (1980).

At the same time, the Courts failed to take into account other factors that would substantially inhibit, if not make impossible, any attempt by beef producers to behave oligopolistically. Despite the fact that evidence of such factors, based on factual material presented by both parties, was unrefuted on the record, the District Court simply ignored it, and the Court of Appeals held that this was proper. Pet. App. 18a. It stated that "[t]hese factors do not establish that past information about the beef industry is inherently unreliable," *id.*, and that such factors "do not resemble the factors such as long-term contracts that the Supreme Court found relevant in *General Dynamics*." *Id.* In *General Dynamics*, however, this Court stated:

> Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.

415 U.S. at 498, citing *Brown Shoe*, 370 U.S. at 322 n.38. *General Dynamics* thus does not allow the lower courts to circumscribe their inquiry arbitrarily, failing to identify and consider all factors that act as significant determinants of present and continued competitive performance.

In any event, one factor that Excel emphasized, both in the District Court and on appeal, comes squarely within the *General Dynamics* rule, since it goes directly to the economic significance of the leading firms' market shares and hence to the likelihood of oligopoly pricing. The record unequivocally demonstrates that much beef industry capacity—including capacity to buy fed cattle and to sell boxed beef—is in the hands of a multitude of small, fringe firms, and that this capacity is highly flexible. Many fringe firms could *double* their present output by the easy expedient of adding a second work shift, and the evidence showed they would immediately do so if industry leaders attempted to depress fed cattle prices or raise boxed beef prices, thus making additional production by smaller firms profitable. J.A. 192, 289-90. Where this is so, it has been recognized that the likelihood of oligopoly pricing by the market's leaders is substantially reduced, since fringe firms would quickly make up the oligopolistic output reduction and market prices will remain competitive.[27] The opinions below never so much as mention this point, despite the fact that it is just the kind of "other factor" that, under *General Dynamics*, clearly deprives high market concentration statistics of their presumptive significance as predictors of oligopoly pricing.

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[27] *Weyerhaeuser Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,315 at 23,382 (FTC September 26, 1985); Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553, 557-61 (1983); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 945, 948-50 (1981); F. M. Scherer, *Industrial Market Structure and Economic Performance* 200 (2d ed. 1980).

D. Summary

As the Second Circuit recently observed, "[a] market definition artificially restricted to existing firms competing at one moment may yield market share statistics that are not an accurate proxy for market power when substantial potential competition able to respond quickly to price increases exists." *Waste Management*, 743 F.2d at 982. The Courts below, in defining markets and in considering entry, failed to understand this critical point. Because of this, and because of their failure to consider other factors that, under *General Dynamics*, undercut the significance of concentration figures, the analysis the Courts below applied in this case fails to support the judgment that the Spencer Beef acquisition threatens to lessen competition substantially.

CONCLUSION

Because Monfort failed to establish antitrust injury, Petitioners respectfully request that this Court reverse the judgment below, and direct the District Court to dismiss the action. If the Court concludes that antitrust injury has been shown, Petitioners respectfully request that this Court reverse the judgment below and remand for reconsideration under the correct Section 7 standards.

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March 28, 1986

RESPONDENT'S

BRIEF

No. 85-473

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CARGILL, INC. and EXCEL CORPORATION,
Petitioners,
v.
MONFORT OF COLORADO, INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the court of appeals err in affirming the trial court's finding that the effect of the proposed acquisition would be substantially to lessen competition by combining the second and third-ranked firms in markets subject to formidable entry barriers and experiencing a trend to increased concentration?

2. Did both courts below err in concluding that a competitor participant in the relevant markets was a proper party to pursue an injunction to prevent the illegal acquisition?

PARTIES TO THE PROCEEDING BELOW AND STATEMENT PURSUANT TO RULE 28.1

The names of all parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are contained in the caption of this case. Pursuant to Supreme Court Rule 28.1, respondent Monfort of Colorado, Inc. states that it has no parent companies, partially-owned subsidiaries, or affiliates.

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No. 85-473

In The

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October Term, 1985

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Petitioners,

v.

Monfort of Colorado, Inc.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The description of the beef industry and the facts giving rise to this lawsuit are reflected accurately in the district court's opinion. Pet.App. 25a-30a. The following supplemental points focus on issues argued in petitioners' brief.

A. History of the Beef Industry

The historical trends in the beef industry illuminate the threatened harm to competition that would arise from Excel's proposed 1983 acquisition of Spencer Beef.[1] Prior

1. As a historical footnote, the beef industry figured prominently in Congress' decision in 1950 to amend Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982 & Supp. II 1984). Two of the asset acquisition "loophole" decisions giving rise to those legislative considerations involved "clearly unlawful" acquisitions in the meat packing industry. *See* 96 Cong. Rec. 16433, 16443 (Dec. 12, 1950) (remarks of Senator O'Mahoney, citing *FTC* v. *Western Meat Co.*, 272 U.S. 554 (1926)).

(footnote continues)

to World War II, the industry was dominated by four old-line packers — Armour, Wilson, Swift and Cudahy — who purchased cattle that had been produced throughout the country and shipped to slaughterhouses in urban centers such as Chicago, Omaha and Kansas City. J.A. 213-14. The carcasses then were shipped to breakers or retailers for further processing. S.J.A. 456.[2]

Changes began after World War II, when farmers and ranchers started feeding cattle commercially. J.A. 214-15. By 1960, most of the cattle slaughtered by the industry were being fed in Iowa, Nebraska, Kansas, Colorado and the Texas Panhandle. *Id.* 215-17. Beef packers that moved to these prime cattle feeding areas realized substantial savings in transportation and feed costs. *Id.* 216-17, 472, 496.

In the mid-1960's, several innovative beef packers developed and introduced the "boxed beef" process, a new method of fabricating and distributing fresh beef. Pet.App. 29a; J.A. 221, 223-24. These packers integrated carcass processing with cattle slaughter, located their facilities in the heart of the cattle feeding country, and utilized the new boxed beef technology to reduce costs even further. *Id.* 473-74. Because of the magnitude of these cost savings, boxed beef became the preferred product and now accounts for over 80% of all table cuts of beef purchased by

(footnote continued)

Furthermore, beef packing was one of the industries whose high two-firm concentration level (47%) was cited as a reason for amending Section 7. *See* 95 Cong. Rec. 11484, 11502 (Aug. 15, 1949) (remarks of Representative Biemiller). Ironically, if the lower courts in the present case had permitted the proposed acquisition, the industry's two-firm concentration level would have returned to 47.7% (output market), the level that originally invoked congressional concern. *See infra* p. 4.

2. References in this brief to "S.J.A." are to the Sealed Joint Appendix. All of Monfort's trial exhibits were offered and admitted at the close of Monfort's case. Tr. 256-57. Rather than repeat this citation throughout this brief, Monfort requests that this single citation be deemed sufficient for purposes of Supreme Court Rule 34.5.

retail supermarkets and the hotel, restaurant and institutional trade. Pet.App. 29a-30a.

The old-line firms failed to respond effectively to these changes. J.A. 218, 473, 495. As a result, the "new breed" packers — IBP, Monfort, Spencer Beef and Excel[3] — rapidly won market share from the established companies and eventually overtook them. *Id.* 218-20; Pl. Ex. 59 at 8.

By the time of trial, these days had ended and the industry was mature, with little potential for growth, thin profit margins and significant barriers to new entry. Pet.App. 27a, 64a-67a. The evidence at trial showed graphically that a low-cost beef packer no longer could expand by taking business away from the major, old-line firms. The "new breed" packers already had reacted to industry changes and enjoyed efficiencies comparable to one another. An internal Excel report said it best: "The industry is steadily concentrating into stronger hands and the days of picking up market share from the majors for the asking are over." S.J.A. 168.

3. Excel (formerly known as "MBPXL") is the product of the merger of Missouri Beef Packers and Kansas Beef Industries. Pet.App. 26a. In 1979, Cargill, Inc. acquired Excel. *Id.* Because Cargill is the nation's largest privately-held corporation, J.A. 503, its financial data have not been publicly available. The record reveals that in fiscal year 1982, Cargill's sales and working capital were in the billions of dollars, and its earnings in the millions. Pet.App. 68a; S.J.A. 340-41. It has since disclosed earnings of $228 million in 1984 and $257 million in 1985. N.Y. Times, March 30, 1986, at F33, col. 1.

IBP was acquired by Occidental Petroleum, Inc. in 1981. Pl.Ex. 66 at 53. While separate line-of-business financial information is not available for IBP, Occidental reported combined sales of $18.5 billion and earnings of $155.6 million in 1982. Pet.App. 27a; J.A. 493-94. Like Excel, IBP tried to grow by acquisition, although the federal government intervened. *See United States* v. *Iowa Beef Packers, Inc.*, 1970 Trade Cas. (CCH) ¶ 73,089 (N.D. Iowa 1970); *cf. Consumers Union of the United States, Inc.* v. *Saxbe*, 1974-1 Trade Cas. (CCH) ¶ 75,057 at 96,760 (D.D.C. 1974) (proposed merger between IBP and Missouri Beef Packers terminated after Department of Justice investigation). *See also* J.A. 499.

These developments, together with numerous mergers and acquisitions, produced a dramatic trend toward concentration in the relevant markets. For example, in the previous five years alone, the four-firm concentration ratio in the procurement market had increased by almost 15 percentage points, from 37.3% to 52%, and the merger of Excel and Spencer would have raised that figure to 57.5%. Pet.App. 62a; J.A. 68-69.

B. The Proposed Acquisition

Recognizing that industry demand could not accommodate the addition of new capacity, S.J.A. 188, 300, Excel sought to grow by acquiring the Spencer plants from Land O'Lakes.[4] This acquisition, involving the second and third largest producers, would have resulted in the following post-merger shares in the relevant procurement and sales markets:[5]

Firm	Fed Cattle Procurement Market	Efficient Slaughter Capacity
IBP	24.4%	28.8%
Excel/Spencer	20.4	23.1
Swift	7.2	8.5
Monfort	5.5	7.9

Firm	Boxed Beef Sales Market	Efficient Boxed Beef Capacity
IBP	27.3%	27.5%
Excel/Spencer	20.4	28.4
Swift	6.1	7.6
Monfort	5.7	8.0

On July 25, 1983, Monfort filed this Section 7 action for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §§ 18, 26 (1982 & Supp. II 1984). Monfort asserted

4. S.J.A. 1-31. Prior to its efforts to acquire the three Spencer plants, Excel had purchased a slaughter plant in Cozad, Nebraska. J.A. 358-60.

5. *See* Pet.App. 62a-63a, J.A. 69, 71; Pet.App. 63a-64a; J.A. 64, 66.

that the acquisition would lessen competition substantially in local or regional markets for the procurement of fed cattle and in the national market for the sale of boxed beef. J.A. 12-23. The case was tried a little more than two months after the complaint was filed and a decision was rendered well before the "transfer date" specified in the agreement between Excel and Land O'Lakes. S.J.A. 22. The parties were afforded a full opportunity to present whatever evidence, expert opinions and arguments they deemed appropriate. None of petitioners' evidence was excluded and petitioners presented each of the major arguments that they now advance in this Court.

C. Monfort's Proof of Threatened Injury

At trial, Monfort proved that while the efficient "new breed" packers historically had grown at the expense of the less efficient old-line processors and fringe firms, those days were past. S.J.A. 168. Excel had acknowledged this commercial reality and had committed itself to increasing its market share through other means and at the expense of smaller, albeit equally efficient, firms like Monfort: "It is critical that we grow in market share during the present instability in the beef processing industry. We must gain share from the leader (IBP) and inhibit the smaller processor's share." S.J.A. 227.

In order to "inhibit" Monfort's market share, the evidence demonstrated that Excel would resort to a strategy based upon the possession of market power backed by its overall resources, rather than the competitive advantage of a more efficient operation. J.A. 275-76, 625-26. Monfort proved it was just as efficient as Excel[6] and petitioners did not show that the proposed Spencer acquisition would generate cost-reducing efficiencies for Excel.

6. J.A. 209-10, 279, 282-83, 292, 450-51, 456, 462, 634, 669; S.J.A. 307; Trial Brief of Defendants Cargill, Inc. and Excel Corp. at 5 (Sept. 30, 1983) (referring to Monfort as "a major feeder and an efficient packer and boxer").

Mr. Monfort also confirmed that so long as Excel priced "slightly above cost we will compete with them." J.A. 666. As a result, Excel's strategy required pricing below its own costs, because, as Mr. Monfort testified, "in order to get rid of us and some of the other good operators and stable companies that I mentioned, they would have to probably lose money themselves to chase others out of business." *Id.* However, Mr. Monfort conceded that in one respect his company would be unable to maintain its competitive efforts. Unlike Excel and IBP, Monfort did not have the financial resources to sustain losses for any length of time. *Id.* 276. Thus, a period of below-cost prices would eliminate it in two or three years. *Id.* 629-30.

Excel's past willingness to operate some or all of its plants at a loss, *id.* 366-67, further demonstrated the likelihood that its efforts would involve below-cost pricing. Indeed, Excel's president admitted the possibility that at times total margins at all of Excel's plants might be below cost. *Id.* 367.

Monfort also proved that the acquisition would provide Excel with the means to pursue such a predatory strategy. First, it would increase Excel's market share and capacity significantly, thereby enhancing its ability to manipulate prices for fed cattle and boxed beef. Second, it would eliminate Spencer, one of the few other firms capable of resisting Excel, and thus expose Monfort to selective predatory tactics. Third, the purchase of Spencer's plants would enable Excel to impose high fed cattle procurement costs on Monfort without adversely impacting all of Excel's plants.

Thus, the evidence showed that Monfort's Grand Island, Nebraska plant was surrounded by Excel's plants in Cozad, Nebraska, and Rockport, Missouri, and the

Spencer plants in Schuyler, Nebraska,[7] and Oakland and Spencer, Iowa.[8] Because of the localized nature of fed cattle procurement, *id.* 258, the acquisition would have placed Excel in a geographic position to raise Monfort's procurement costs by paying higher prices for cattle at Excel's post-merger northern plants, with only minor impact on Excel's costs at its southern facilities.[9] *Id.* 61, 365-66; S.J.A. 348; Pet.App. 34a. At the same time, Excel could reduce the price of its boxed beef, and Monfort would have little choice but to follow Excel's price in order to remain competitive. The resulting cost-price squeeze would reduce revenues below costs.

The cost-price squeeze made possible by the Spencer acquisition would eliminate the competitive vigor of viable, smaller rivals, like Monfort, and leave the markets dominated by two firms. Those firms then would be insulated from challenge by significant entry barriers arising from the necessity of substantial capital investment in specialized assets and from the psychological intimidation inherent in the size of the industry leaders and the fate of previous small rivals.

The reward for such a strategy would come from higher boxed beef prices in the future and enhanced profits for Excel — resulting from the operation of classic oligopoly (or duopoly) markets. Thus, despite current low profits

7. At the time of trial Spencer's plant at Schuyler, Nebraska was closed. However, Excel acknowledged that the plant was a relatively modern, integrated slaughter-fabrication facility. S.J.A. 228. In addition, the evidence showed that everyone in the industry assumed Schuyler would reopen, J.A. 617, and it did so following trial in this matter. Order dated June 26, 1985 at 3 (denying Excel's motion to modify injunction).

8. Land O'Lakes acknowledged the geographic advantage of the Spencer plants and the "competitive strategies" they afforded Excel. S.J.A. 67. *See id.* 533-36 (maps showing the locations of the key facilities).

9. Excel recognized the strategic significance of plant location: "[a]fter IBP begins Genesea [Ill.] they will have near monopoly. We should be able to locate a unit to share situation with them." S.J.A. 47.

in the industry, Cargill was "confident that within two to three years [the Spencer purchase] will prove to be a very sound and farsighted acquisition and will place Excel in a very strategic position for the late 1980's and 1990's. By then it's going to be one hell of a business for Cargill." S.J.A. 301. [10]

D. The Decisions Of The Courts Below

Following trial, the district court rendered its decision resolving all of the contested issues. First, the opinion carefully considered this Court's prior standing decisions under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), and held that Monfort's claims had satisfied those precedents, including the requirement that it allege antitrust injury. Pet.App. 30a-40a.

Second, concluding that the twelve state regional market for the procurement of fed cattle[11] and the national market for the sale of boxed beef constituted the relevant markets, the court held that the acquisition created not an " 'ephemeral possibility,' " but rather "a distinct and significant probability that the proposed acquisition would harm competition" in both relevant markets. *Id.* 61a.

Finally, in light of the evidence introduced at trial, the district court concluded that Monfort had met Section 16's prerequisites for injunctive relief. In particular, the court found that Monfort had demonstrated that "Excel plans to take steps to manipulate the market in an effort to inhibit small processors and acquire an increased market share" and that, following the acquisition, there was "a distinct possibility" of a predatory cost-price squeeze that would

10. Land O'Lakes had a similar view from a different perspective: the larger profits "which we believe probable after further industry consolidation, would support a higher selling price" for the Spencer plants. S.J.A. 69.

11. The twelve state region includes all or parts of Nebraska, South Dakota, Southern Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kansas, Eastern Colorado, and the panhandle region of Texas, Oklahoma and New Mexico (hereafter, "the twelve state region"). Pet.App. 47a.

injure Monfort and the other smaller competitors. *Id.* 71a. Accordingly, the district court permanently enjoined petitioners from consummating the proposed acquisition. *Id.* 72a.

On appeal, petitioners challenged the trial court's conclusion that Monfort had standing to pursue its claim and also sought to overturn the decision that the proposed acquisition violated Section 7. But they did not contest the findings that Monfort had satisfied the requisites of Section 16, including proof of threatened harm to Monfort arising from the acquisition. *Id.* 5a-6a n. 2. Therefore, the court of appeals did not review that portion of the district court's opinion dealing with these issues. Instead, it confined its opinion to the sufficiency of Monfort's standing claims and the proof of a Section 7 violation. *Id.* After a thorough review of the record and a careful examination of the legal standards the district court had applied, the court of appeals affirmed those aspects of the decision petitioners had challenged.[12]

12. Having abandoned, for whatever tactical reason, their challenge to the adequacy of Monfort's proof of Section 16's prerequisites for issuance of an injunction, petitioners now attempt to pursue those issues in this Court. In a footnote in their brief, petitioners belatedly claim that the court of appeals was "incorrect" in concluding that they had not contested the lower court's findings on this issue. Pet.Br. 15 n.8. However, petitioners *did not* move for rehearing before the circuit court in order to correct the panel's allegedly erroneous conclusion about the scope of their appeal and the petition for certiorari *did not* specify that conclusion as error.

Moreover, the fact remains that the court of appeals did not review the trial court's findings on these issues and the correctness of the appellate court's view of the appeal is not before this Court for review. In these circumstances, petitioners should not now be permitted to change tactics and challenge the district court's findings. *See, e.g., County of Oneida* v. *Oneida Indian Nation of New York State,* 105 S.Ct. 1245, 1257 (1985); *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752, 759 n.6 (1984).

SUMMARY OF ARGUMENT

Two courts already have found that the proposed acquisition violated Section 7. In this Court, Excel does not challenge either the accuracy of the trial court's market definitions or its conclusion that Monfort's evidence established a prima facie violation. Rather, Excel contends that it rebutted this showing and disputes the district court's findings to the contrary. Similarly, Excel and the Government fault the trial court's analysis of the barriers to entry into the relevant markets. But the court properly considered facts such as the cost and specialized nature of the assets needed for entry and the time required to accomplish it, as well as the psychological barriers to new entry resulting from the high degree of concentration in the industry.

As its opinion reveals, the district court meticulously considered and evaluated each of the evidentiary points Excel brings to this Court. After doing so, the district court rejected them as unpersuasive and unsupported by the weight of the evidence and the court of appeals affirmed. In short, Excel's arguments failed below not for lack of consideration, but for a more fundamental reason: lack of proof. *See Allen Trust Co.* v. *Georgia*, 326 U.S. 630, 636 (1946).

Excel and the Government devote the bulk of their effort to arguing that Monfort was not a proper party to seek an injunction against the proposed acquisition. Lacking any support in either the language or the legislative history of the Clayton Act, they fashion a host of arguments that amount to no more than an effort to amend Section 7 and Section 16 — arguments that plainly are addressed to the wrong forum.

Perhaps the most glaring example of a request for judicial amendment is the Government's proposed rule that, in effect, would preclude all competitor challenges to

horizontal acquisitions under Section 16. The Government not only fails to identify any cases that remotely support its purported policy justifications, it also ignores the practical reality that competitors often are the most effective and likely parties to vindicate the congressional goal of private enforcement under Section 16.

Similarly, Excel and the Government would "amend" Section 7 by equating it with Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). Thus, they claim that the district court should not have considered Monfort's allegations of a predatory cost-price squeeze arising from the acquisition because Excel would not enjoy a "dominant" post-acquisition market share. Section 7 was designed specifically to arrest accumulations of market power before they gave rise to Section 2 liability. Accordingly, these Section 2 arguments are irrelevant to the inquiry in this case.

Likewise, Excel seeks to limit the scope of Section 7 to acquisitions that would result in oligopoly pricing. Concluding that such pricing cannot injure a competitor, Excel argues that Monfort is not a proper party to bring this suit. This Court has recognized that Section 7 is concerned both with preventing acquisitions that threaten to create oligopoly markets and with preserving the existence and economic vigor of smaller competitors. Here the proposed acquisition threatened to result in a below-cost squeeze that ultimately would exclude smaller firms, including Monfort; thus, Monfort's suit is fully consistent with Section 7.

Even under Excel's limited view of Section 7, the trend toward oligopoly pricing resulting from the acquisition actually threatened harm to Monfort. Oligopoly pricing cannot succeed if any firm chooses to "go it alone," and Monfort was not willing to sacrifice its economic freedom. Because Monfort's operations were as efficient as those of Excel, only below-cost pricing could remove Monfort as an

obstacle. Moreover, the trend toward oligopoly pricing posed a threat of harm to Monfort even if it were disciplined to go along, since Excel had no intention of sharing in the reduction of overall industry output essential to the success of oligopoly pricing. Rather, it intended to impose those output reductions on smaller rivals, which would threaten them with harm in the form of lower revenues from disproportionately-reduced output. At bottom, oligopoly pricing and its anticompetitive effects on consumers would not occur without inflicting harm on Monfort, so that Monfort's injury was "inextricably intertwined" with the injury to consumers flowing from the accomplishment of the oligopoly. *Blue Shield of Virginia, Inc.* v. *McCready*, 457 U.S. 465, 484 (1982).

Excel attempts to avoid Monfort's allegations of injury by labeling Monfort's concern a fear of "heightened competition" and "increased efficiencies." Yet Excel failed to show any cost-reducing efficiencies flowing from the acquisition. Moreover, Monfort's claimed injury arose from the threat of pricing below Excel's own costs rather than from the efficiency-based competition that previously had characterized the industry. As a result, Excel's efforts fairly could be characterized as "predatory." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847, 2859 (1985).

Finally, the record demonstrated that Monfort was a supplier of fed cattle as well as a competitor of the merging firms. As such, it clearly was a proper party to bring this suit.

ARGUMENT

I. MONFORT WAS A PROPER PARTY TO PURSUE THIS INJUNCTION ACTION

In challenging the proposed combination of two of its three largest competitors, Monfort claimed that Excel's

resulting market power threatened, in light of its intentions, to lead to a predatory cost-price squeeze that would force smaller rivals, including Monfort, from the market for reasons other than the relative efficiencies of the firms.

Excel and the Government mount a multi-pronged attack on the conclusion that Monfort was a proper party to pursue these claims. Before turning to these arguments, we briefly review the decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), on which Excel so heavily relies.

In *Brunswick*, one of the nation's largest bowling equipment manufacturers acquired six bowling centers that had defaulted on loans for the purchase of the manufacturer's equipment. Several competing bowling centers then sued for treble damages under Section 4. Their sole damage theory was the claim that the acquisitions had deprived them of the additional profits they would have earned had the acquired centers been permitted to go out of business. As the Court noted, plaintiffs essentially claimed that they had been deprived "of the benefits of increased concentration" and the profits they would have realized "had competition been reduced." *Id.* at 488. Not surprisingly, the Court concluded that it "is inimical to the purposes of [the antitrust] laws to award damages for the type of injury claimed here." *Id.*

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489. Excel relies selectively on language in the Court's opinion to argue that Monfort did not complain

that it would suffer "antitrust injury" or that "the anticompetitive consequences that make the acquisition unlawful threaten [it] personally with harm." Pet.Br. 17. Unlike the *Brunswick* plaintiffs, however, Monfort's claim *did not* arise because it was being deprived "of the benefits of increased concentration" and its threatened injury *did* reflect "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Most importantly, Monfort's threatened injury *was* "of the type the antitrust laws were intended to prevent" and *was not* "inimical to the purposes of" those laws. Consequently, the lower courts correctly permitted Monfort to pursue its action, because its threatened injury fell "squarely within the area of congressional concern." *McCready*, 457 U.S. at 484; *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 538 (1982).

A. Because Section 7 Is Concerned Not Only With The Threat Of Oligopoly Pricing, But Also With The Continued Existence And Economic Vitality Of Smaller Rivals, Monfort's Injury Was Of The Type The Antitrust Laws Were Intended To Prevent

Excel asserts that Monfort's claim of injury arose from post-acquisition exclusionary conduct and that this claim was "inconsistent" with Excel's view of the theory of a horizontal merger violation — the "consequent increased danger of oligopoly pricing." Pet.Br. 17-18.

Excel's argument rests on the proposition that, in the case of horizontal acquisitions, Section 7 should be seen as encompassing only mergers that create a monopoly or foster oligopoly pricing.[13] The corollary to this view is that a merger's adverse effects on the competitive vigor of the

13. Pet.Br. 3. Excel acknowledges that the anticompetitive effect of oligopoly applies equally to suppliers, *i.e.*, it threatens lower than competitive prices for fed cattle. *Id.* 3-4 n.1.

remaining firms in the market, like Monfort, need not be considered because these firms are merely the beneficiaries of oligopoly pricing.

However, the legislative history of Section 7 and this Court's prior decisions are to the contrary. In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 333 (1962), the Court rejected the very argument that Excel advances, emphasizing that congressional concern extended not only to acquisitions that actually created an oligopoly market, but also to acquisitions that threatened to lead to such a market structure: "a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Id.* 317. *Accord Brunswick*, 429 U.S. at 485; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963).

Moreover, Congress recognized that the principal obstacle to such a trend is the existence of a number of independent rivals willing to compete vigorously with the industry leaders. *See United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). As a result, Section 7 was intended to halt acquisitions that unduly increased the power of the merging firms and threatened to remove or inhibit the competitive vigor of the remaining rivals and thereby lead to higher prices. *See FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 575 (1967) (acquisition threatened to discourage "active competition from the firms already in the industry due to the fear of retaliation" by the industry leader);[14] *Brown Shoe*, 370 U.S. at 344 (one significant anticompetitive aspect of the horizontal merger was the

14. In that case, the Federal Trade Commission had found, as did the trial court here, that "there was also the danger that Procter might underprice Clorox in order to drive out competition, and subsidize the underpricing with revenue from other products." 386 U.S. at 575. *See also Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 229-30 (D.C. Cir. 1962).

threat to smaller rivals that the merged firms "can market their own brands at prices below those of competing independent retailers").

Indeed, *Brunswick* itself confirmed that Section 7 was concerned not only with customers, but also with the fate of the remaining smaller rivals. The Court recognized that even under Section 4, *competitors* can prove actual injury from an acquisition "before they actually are driven from the market and the competition is thereby lessened." *Brunswick*, 429 U.S. at 489 n.14. *Accord* H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949) (Section 7 does not require proof "that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices").

Monfort alleged that the source of its threatened injury was the same type of exclusionary conduct flowing from the acquisition, and Excel's claim that Monfort, as a competitor, should not have been permitted to proceed ignores this Court's earlier observation:

> It is *competition*, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote *competition* through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Brown Shoe, 370 U.S. at 344 (emphasis added). *See also* Pet.App. 7a n.4.

Since these words were written, Congress amended the Clayton Act in 1976 by enacting the Hart-Scott-Rodino Antitrust Improvements Act, which, *inter alia*,

imposed a mandatory premerger notification requirement. 15 U.S.C. § 18a (1982 & Supp. II 1984). The Committee reports accompanying this legislation did not repudiate earlier interpretations of the congressional intent underlying Section 7. On the contrary, the Senate Judiciary Committee concurred with the "summary of the underlying purposes of the merger provisions of the Clayton Act, as recounted by Mr. Justice Black in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 274-76 (1966) . . . ."[15] More recently in 1980, Congress reconsidered Section 7 itself and, rather than expressing dissatisfaction with its economic philosophy, expanded its scope.[16]

If in the intervening years, some have concluded that the only relevant anticompetitive effect of a horizontal acquisition should be "oligopoly pricing,"[17] and that Congress was wrong in its choice of economic philosophy,[18] or that its concern with the impact of mergers on competitors was ill-founded, then Congress ought to be persuaded to amend Section 7.

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15. S. Rep. No. 803, 94th Cong., 2d Sess. 63 (1976) (quoting at length from the opinion). *See also* H.R. Rep. No. 1373, 94th Cong., 2d Sess. 7 (1976).

16. *See* S. Rep. No. 238, 96th Cong., 1st Sess. 2-3 (1979); H. R. Rep. No. 871, 96th Cong., 2d Sess. 1-2 (1980). The cited reports accompanied the Antitrust Procedural Improvements Act of 1980, 94 Stat. 1154 (codified principally in scattered sections of 15 U.S.C.), which extended Section 7 to reach non-corporate acquisitions as well as acquisitions of firms in or affecting interstate commerce.

17. *But see* Report of the Attorney General's National Committee to Study the Antitrust Laws 127 (1955) ("When the acquired and acquiring firms operate in the same markets, however, effects [of the acquisition] may be most marked upon competitors of the acquiring and the acquired company.").

18. The philosophy that "[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the anti-merger statute." *Philadelphia National Bank*, 374 U.S. at 363.

In fact, the present Administration recently has proposed legislation to Congress that would do just that.[19] If and when this proposal becomes law, it will be time to argue that Section 7 is not an incipiency statute, that it is concerned only with "oligopoly pricing," and that a horizontal acquisition's anticompetitive effects on competitors, such as Monfort, is not "injury of the type the antitrust laws were intended to prevent."

B. Because A Trend Toward Oligopoly Pricing Would Harm Monfort, Its Injury Reflected The Anticompetitive Effect Of The Violation And Of Acts Made Possible By The Violation

Even under Excel's narrow view of Section 7, Monfort's allegations of injury were sufficient. As Professor Areeda has recognized, oligopoly pricing "will not be possible when any significant firm chooses, for any reason, to 'go it alone'." P. Areeda, *Antitrust Analysis* 232 (2d ed. 1974). In this instance, Monfort had no intention of willingly sacrificing its own economic freedom to follow the industry leaders. Because it was at least as efficient as Excel,[20] *see supra* p. 5 & n. 6, the only means for removing the obstacle posed by Monfort was a cost-price squeeze that would force all industry participants, including Excel, to incur actual losses. Hence, notwithstanding Excel's assurances that Monfort would benefit, the trend toward

19. This legislation would repeal the "to lessen competition, or to tend to create a monopoly" standard of Section 7 and adopt the concept that an acquisition is illegal only where "there is a significant probability that such acquisition will substantially increase the ability to exercise market power," where "market power" is defined as "the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time." The proposed amendments to Section 7 were announced on February 19, 1986. *See* 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253 at 307 (Feb. 20, 1986). The text of the amendment is in a Special Supplement (pp. S8-9) to this edition of the report.

20. For a candid appraisal of Excel's relative inefficiencies, *see* Pet.Br. 39-40 n. 21.

oligopoly pricing resulting from the acquisition actually threatened harm to Monfort — in the form of losses it would sustain as a result of a below-cost squeeze designed to discipline Monfort and force it to follow the industry leaders.

Alternatively, Excel's argument may be that Monfort could avoid losses from a disciplinary cost-price squeeze by agreeing to give up its economic freedom and go along with the industry leaders.[21] In the circumstances of this case, Excel's proclamation that the resulting higher oligopoly prices could "*never*" injure a competitor, regardless of their adverse impact on suppliers of fed cattle or consumers of beef, has a hollow ring. Pet.Br. 18 (emphasis in original). The operation of an oligopoly here could indeed injure Monfort (albeit less seriously than below-cost operations) in light of the trial court's conclusion that it was Excel's plan "to manipulate the market in an effort to inhibit small processors and acquire an increased market share." Pet.App. 71a.

As Excel points out, the extraction of higher oligopoly prices from consumers will be accompanied by a reduction in overall industry output. Pet.Br. 3. The oligopoly as a whole benefits from oligopoly pricing to the extent that the increased revenues generated by supracompetitive prices exceed those lost through lower output. More importantly, each member of the oligopoly benefits only if necessary industry output reductions are shared equally among all industry participants. Here, however, Excel had no intention of sharing in the necessary output reductions; it intended to foist them on the smaller firms by inhibiting their market shares while increasing its own. Pet.App. 71a.

21. "In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive." *Philadelphia National Bank*, 374 U.S. at 367 n.43.

Thus, the threatened trend toward a post-acquisition oligopoly market presented Monfort with two choices, both of which would inflict antitrust injury: lower revenues through disproportionately reduced output, or actual losses from a retaliatory cost-price squeeze when Monfort failed to go along.

In short, the facts in this case belie Excel's claim that Monfort's suit was barred because its threatened antitrust injury was not linked to the effects of "oligopoly pricing," as purportedly required by *Brunswick*. Equally important, Excel's assertion that *Brunswick* requires such a link was expressly rejected in *McCready*, 457 U.S. at 482-83. There, Blue Shield refused to reimburse McCready under her health plan for treatment she received from a psychologist. While the challenged conspiratorial agreement was illegal only because of its anticompetitive effects on psychologists, and while Blue Shield argued that McCready's injury could not have flowed from such anticompetitive effects, the Court found that McCready's injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists." *Id.* at 484. *See Associated General Contractors*, 459 U.S. at 538 (confirming *McCready's* interpretation).

In this case, an uncooperative Monfort stood as an obstacle to the establishment of an oligopoly and its higher prices. Monfort's claimed injury arose from the threat of Excel's post-acquisition actions to remove that obstacle. Absent this injury to Monfort, the threat of "oligopoly pricing" with its anticompetitive effects on consumers would not occur. In that sense, the threatened injury to Monfort was like McCready's, "inextricably intertwined" with the injury to consumers, and thus reflected the anticompetitive effect of the violation and the "anticompetitive acts made possible by the violation."

C. Because Monfort's Claimed Injury Did Not Flow From "Heightened Competition," Its Request For An Injunction Was Not Inimical To The Antitrust Laws

Excel contends that Monfort failed to allege a causal connection between the threatened injury and the acquisition. Pet.Br. 27. Hence, Excel asserts, Monfort's injury claim reflected merely a fear of "increased efficiencies" and "heightened competition," which was not "antitrust injury" under *Brunswick*. *Id.* 28-29.

This argument perpetuates Excel's narrow focus on oligopoly pricing. As discussed previously, Section 7 is equally concerned with the prevention of acquisitions that enhance the means and opportunity for a leading firm to engage in anticompetitive, exclusionary behavior. Monfort specifically claimed a causal link between its threatened injury and the means and opportunity afforded by the proposed acquisition — a substantial increase in Excel's market share and thus its ability to depress prices,[22] strategically located plants from which to target Monfort's procurement costs,[23] and elimination of Spencer, the third largest competitor and one of the few firms that stood as an obstacle to Excel's efforts to gain co-leadership of this industry with IBP (J.A. 508-9). *See* Pet.App. 34a.

Nonetheless, Excel claims that the only relationship between such a cost-price squeeze and the challenged acquisition would arise from possible "efficiencies" resulting from the transfer of the Spencer plants. *See* Pet.Br. 29.

22. Excel disregards the fact that each of the courts below found a causal relationship between the increased market share captured by Excel as a result of the acquisition and the threat of a below-cost squeeze. *See* Pet.App. 8a, 10a, 34a, 71a.

23. *See supra* pp. 6-7. Adoption of such a strategy would enable Excel to inflict losses on Monfort without forcing Excel to absorb company-wide losses at all of its plants. *See* Schmalensee, *Another Look at Market Power*, 95 Harv. L. Rev. 1789, 1800 (1982).

Implicit in this claim is the suggestion that such "efficiencies" would enable Excel to lower its costs so that it could accelerate the historical cost-price squeeze and drive out its smaller rivals without selling below its own costs.

This argument fails because, in the district court, Excel did not show the existence, much less quantify the extent, of *any* cost-reducing "efficiencies" resulting from the acquisition.[24] Instead, the evidence showed that Monfort's operations were at least as efficient, if not more so, than those of Excel. Accordingly, Excel's post-acquisition efforts to accelerate the "historical" cost-price squeeze to a level where Monfort would incur crippling losses also would impose losses on Excel. And Mr. Monfort specifically alleged that the threatened injury, which formed the basis of this lawsuit, was pricing by Excel below its costs — not its profitable or more efficient operations. J.A. 666.[25] That allegation was not as far-fetched as Excel claims. The trial evidence showed that Excel had operated its own plants at a loss. *See supra* p. 6.

Ultimately, the argument that Monfort's only fear was "heightened competition" amounts to little more than a game of labels in which Excel insists that the court of

24. Excel's brief highlights the lack of any such showing by basing its "efficiency" argument entirely on the claim that Monfort argued to the court of appeals "that the acquisition would allow Excel to achieve multi-plant efficiencies that Monfort did not have." Pet.Br. 28.

In its brief, Monfort did not argue that the Spencer acquisition would confer multi-plant efficiencies on Excel; Excel already was a multi-plant operator. Rather, Monfort argued that, because of its overall size and multi-plant operations, Excel could impose selectively a cost-price squeeze on Monfort. Brief for Appellee Monfort of Colorado, Inc. at 42-43 (June 8, 1984).

25. The same claim of threatened injury through below-cost pricing to drive the smaller competitors out of business also was set forth in Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 17. *See also* J.A. 276, 626, 669; Pretrial Order at 6 (Excel's characterization of Monfort's theory of injury as involving the threat of interdependent "predatory activity" by Excel and IBP).

appeals erred in characterizing Monfort's alleged injury as flowing from a form of "predatory" conduct that would be followed by higher prices to customers. Pet.Br. 16, 30. Yet, this Court has recently concluded that where "a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co.*, 105 S.Ct. at 2859. This is precisely what Monfort claimed.

As the lower courts recognized, the teaching of *Brunswick* and *Associated General Contractors* is that the issue of "antitrust injury" cannot be resolved by applying labels.[26] Characterizing a course of conduct as "competition" provides no answer to whether that conduct is capable of inflicting "antitrust injury."[27] Rather, the nature of the alleged conduct must be examined to determine whether it is "inimical" to the purposes of the antitrust laws.

The court of appeals concluded that Monfort's claim of injury did not arise from the continued "competition" of the Spencer plants.[28] Instead, Monfort claimed that the acquisition would lead to a manipulation of the input cost of fed cattle and the output price of boxed beef so that, as Excel acknowledges, "some of the 'smaller' or less efficient members of the industry, conceivably including Monfort

26. In *Brunswick*, the Court noted that private plaintiffs could prove actual "antitrust injury" under Section 4 arising from anticompetitive behavior such as predatory below-cost pricing which might be viewed, at least in the short term, "*to stimulate price competition.*" 429 U.S. at 489 n.14 (emphasis added).

27. For example, the court of appeals noted that Excel and its economic authorities had characterized predatory pricing as "pure competition." Not surprisingly, the court did not find such a characterization dispositive. Pet.App. 8a-9a.

28. *See* Pet.App. 6a n.3. Indeed, the situation in this case is the exact opposite of that in *Brunswick* because the district court found that the threatened injury to Monfort would *not* arise in the event that Spencer was acquired by any firm other than Excel or IBP, the other industry leader. Pet.App. 34a.

itself, would suffer losses and ultimately be forced out of business." Pet.Br. 27. In other words, fed cattle would be purchased and boxed beef sold at levels where costs exceeded revenues. And Monfort's injury would flow *not* from the efficiency-based competition that had transformed the beef industry in the past twenty years, but from a specific form of predatory conduct targeted at Monfort.

Thus, the injury threatened by the proposed horizontal acquisition did not arise because Monfort was deprived of "the benefits of increased concentration" or because of gains it would have realized had "competition been reduced." As a result, the prevention of such injury "is not inimical to the purposes" of the antitrust laws.

D. The Lower Courts Properly Considered Monfort's Claim Of Injury Resulting From A Predatory Cost-Price Squeeze

At the time the complaint was filed, the Spencer acquisition had not occurred. Therefore, Monfort could not allege that a predatory cost-price squeeze would "in fact" take place following the acquisition. *See* Pet.App. 71a. Contrary to Excel's suggestion,[29] however, Monfort did contend that as a result of the acquisition there was a substantially increased likelihood that Excel would engage in such predatory pricing at the expense of its smaller rivals. *Id.*

29. Pet.Br. 30. *See also* Gov.Br. 4-5. Excel and the Government both rely on the district court's statement that "[p]laintiff does not contend that predatory practices would be engaged in by Excel. . . . " Pet.App. 32a. But this statement must be read in the context of the court's later observation that "Monfort does not allege that IBP and Excel will *in fact* engage in predatory activities. . . . " *Id.* 71a (emphasis added).

Monfort did not allege that *in fact* Excel would engage in predatory activities: the merger had not yet occurred and no litigant in good faith can allege that some future event will "in fact" occur. Monfort did allege that the cost-price squeeze would be predatory (*see supra* p. 22 & n. 25) and the district court found that "such practices [were] a distinct possibility." *Id.* 71a.

The Government argues that the lower courts should have disregarded this predation claim because Excel would not possess a "dominant share of the market." *See* Gov.Br. 20. It contends therefore that Monfort could not assert that Excel's actual post-acquisition predatory pricing would constitute an attempt to monopolize in violation of Section 2 of the Sherman Act, since such a violation requires a dangerous probability of success.[30]

This argument attempts to rewrite history by asking the Court to ignore Section 7. However, Congress did not enact Section 7 in 1914 or amend it in 1950 and 1980 merely to duplicate the Sherman Act. Section 7 was intended to halt the accumulation of market power gained by merger *before* it reached Sherman Act levels, even where the anticompetitive effects associated with the acquisition "may not be so far reaching as to amount to a violation of the Sherman Act."[31] Accordingly, the Government's "dominant share" argument and the Section 2 precedents on which it relies are irrelevant here where the pertinent statute is Section 7 and where it is not necessary to allege that the challenged acquisition threatens monopolization.[32]

30. Gov.Br. 19-20 nn. 26, 27. All of the cases cited in the Government's brief deal either with claims of monopolization or attempt to monopolize under Section 2. Section 7 embodies a different standard for evaluating the accumulation of power by acquisition as opposed to the growth of a firm through internal expansion. *See Philadelphia National Bank*, 374 U.S. at 370.

31. Report of the Attorney General's National Committee to Study the Antitrust Laws 118 (1955). Even Excel concedes that acquisitions threaten customers with "antitrust injury" from future non-collusive, interdependent "oligopoly pricing," Pet. 22 — even though the actual occurrence of oligopoly pricing itself would not amount to a violation of the Sherman Act.

32. See, e.g., S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950) ("The intent here, as in other parts of th Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

Excel tenders the same "dominant market share" argument as does the Government, also relying on Sherman Act authorities. Pet.Br. 31 nn.14,15. Attempting to make the argument relevant to this Section 7 case, Excel pronounces that

> in order to drive rivals out of business, the would-be predator must have enough capacity to supply all, or at least most, market demand; otherwise, he can cut price to the bone and a number of rivals will still exist, filling the market demand that the predator cannot fill, and doing so at presumably profitable prices.

Id. The only authority Excel offers for this counter-intuitive notion is *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348 (1986). Presumably, Excel seeks support in the statement in *Matsushita* that "[i]f there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the 'real' market price and the conspirators suffer losses to little purpose." *Id.* at 1358. This may be true where the would-be predator's share is so small that other competitors can ignore its low prices. However, where there are but a few significant firms in the industry, competitors will be aware of and react to the efforts of one another so that the action of a single substantial rival can affect overall market prices.[33] *See* P. Areeda, *Antitrust Analysis* 225 (2d ed. 1974). Indeed, absent a conspiracy not to compete with Excel, the suggestion that competitors like Monfort or IBP would not react to price cuts by Excel seems fantastic.

33. *Matsushita* cited with apparent approval *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 698-701 (1967), where the Court found that two firms with approximately 8.3% and 12.1% of the market had depressed price levels through below cost sales. *See* 106 S.Ct. at 1359 n.8. In the present case, the proposed acquisition would have increased Excel's market share to more than 20%.

In fact, one would expect precisely the opposite result in this and many other industries. That is, one would expect that neither IBP nor Monfort would suffer impassively the loss of volume, the increased per unit costs and the risk of customer ill-will from failing to compete — but instead would match Excel's price cuts.[34] As other competitors did the same, the result would be a decline in the overall market price. *See William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1046-47 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) (describing how a below-cost price cut to a single customer spread rapidly throughout the market, since "each competitor ignored this new price at its peril"). In fact, the contrary picture painted by Excel is so divorced from reality that Excel's own president William Fielding, testified that the industry simply does not work that way. *See* Tr. 268, 281-82.

Thus, the testimony at trial and common sense refute Excel's argument that, because the acquisition would result *only* in a market share exceeding 20% rather than 30%, the courts below should have denied standing to Monfort by ignoring its allegations that Excel acting alone could depress market prices and thus cause losses to its smaller rivals.[35]

Finally, Excel suggests that Monfort's allegations should have been disregarded because a predatory pricing strategy to ruin all or most of Excel's rivals was not "rational," since the losses so incurred could not be recouped in the future in the form of higher monopoly

34. This reaction is so expected that Congress enacted a specific defense under the Robinson-Patman Act to enable a firm to meet the lower price offered by a competitor. *See* 15 U.S.C. § 13(b) (1982).

35. Indeed, Excel itself noted that "IBP has a short-term advantage with its price influence due to 20% market share. The 20% figure has additional impact when you consider its [sic] double our share and almost four times larger than Swift." S.J.A. 246.

prices. Pet.Br. 31.[36] While this may be an acceptable argument in defense of a monopolization case,[37] it is offered here as a novel basis for denying Monfort the opportunity to submit any proof at all, i.e., to deny Monfort standing to bring its lawsuit.[38]

In this case, such a result would indeed be novel, because Monfort did not allege that following the acquisition Excel would attempt to monopolize the market. Monfort argued, and the lower courts agreed, that exclusionary behavior rather than high prices would be the first-

36. Some commentators have concluded that such a strategy is irrational because accomplishment of the same ends through merger is less uncertain and likely to be no more costly. *See* McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & Econ. 137, 143 (1958). *But see* Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & Econ. 129, 130-31 (1972) (even if it is assumed that all horizontal acquisitions are lawful, predation still makes sense if only to drive down the acquisition price of the victim).

37. However, not all commentators agree that such a strategy is always irrational. R. Posner, *Antitrust Law: An Economic Perspective* 186 (1976) ("my conclusion is that predatory pricing cannot be dismissed as inevitably an irrational practice."); F.M. Scherer, *Industrial Market Structure and Economic Performance* 337-38 (2d ed. 1980).

Moreover, the fact that some deem a course of conduct not to be "rational" does not mean that it will not occur. *See* U.S. Dept. of Justice, *Report on the Robinson-Patman Act* 167 (1977). *See also* Gov.Br. 22 n.33. Predatory pricing may occur where the predator is trying to teach a "lesson" to maverick competitors "to abandon competitive behavior the predator finds inconvenient or threatening." R. Bork, *The Antitrust Paradox* 144 (1978). *Accord* III P. Areeda & D. Turner, *Antitrust Law* ¶ 711b at 151 n.5 (1978).

38. In *Matsushita*, the Court noted that many commentators agree that predatory pricing schemes to achieve a monopoly by driving all rivals from the market are rarely attempted because of the difficulty of recouping the losses sustained through predation. *See* 106 S.Ct. at 1357-58. Such difficulties are increased further by the complexities associated with coordinating a conspiracy to achieve these results. *Id.* However, the Court did not suggest that plaintiffs had no standing to pursue such allegations or to rebut the opinions of such commentators; instead, it held only that the proof presented as to the existence of such a conspiracy, after years of discovery, was insufficient to withstand a motion for summary judgment.

round effect. The acquisition would create new opportunities for Excel to manipulate costs and squeeze prices so as to eliminate within two or three years — not all competitors — but only those smaller ones that stood as an obstacle to an oligopolistic market. Following this period, Monfort claimed that Excel would recoup its losses from the higher oligopoly prices paid by consumers.[39] Quite properly, the lower courts did not disregard those allegations in ruling that Monfort should be permitted to proceed.

E. The Government Provides No Basis For A Per Se Rule Depriving Competitors of Standing To Challenge Horizontal Acquisitions

The Government ultimately eschews any reliance on the allegations or facts in this case as an excuse for denying

39. Excel also argues that such a strategy would only make sense where barriers to new entry were high. However, some commentators have recognized that a firm's success in driving rivals from the market can itself create substantial barriers to new entry. For example, Professor W. Bruce Erickson has recently reported that, based on his experience as an academician and an adviser to venture capitalists, "what happens is that, if a firm is eliminated from a market by a predatory practice, new producers will not come in even if the prices are increased to levels where they think they could make a profit, the reason being that they expect to be eliminated by a repetition of that same predatory practice, plus the fact that their bankers won't finance them to go into that industry." Erickson, *Antitrust, Large Corporations and the Innovation—Entrepreneurship Problem: A "Satellite" Approach*, 17 Antitrust L. & Econ. Rev. 67, 76 (1985).

Deputy Assistant Attorney General Leddy made this same point: "If what you're saying is that predatory behavior can be entry deterring, I would agree. It is hard, however, to establish fear of predation as an entry barrier, as hard if not harder than establishing it as an antitrust violation in the first place." *Panel Discussion*, 54 Antitrust L.J. 1271, 1275-76 (1986).

Monfort standing. Instead, it advocates a per se rule that would bar competitor standing under Section 16 to challenge any horizontal acquisition.[40]

The Government's position is not based on the language of the Clayton Act or its legislative history. As this Court has recognized on numerous occasions, this history reflects a congressional intent that private parties provide significant assistance in the enforcement of the nation's antitrust laws, either through damage actions under Section 4 or suits for injunctive relief under Section 16.[41]

While prior decisions have imposed standing restrictions on damage actions under Section 4,[42] equitable proceedings under Section 16 involve different remedies and considerations. *See, e.g., Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-61 (1972). In an injunction action, complex, speculative damage issues do not arise. Similarly, equitable actions impose no threat of multiple or massive liability for a defendant; nor is there any prospect that courts would be confronted by endless lawsuits, since "one injunction is as effective as 100." *Id.* at 261.[43] Reflecting

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40. To be precise, the Government advocates a per se rule only where a competitor's standing is based on allegations of post-acquisition predatory conduct. Gov.Br. 10. However, since the Government does not acknowledge any other conceivable set of allegations that would confer competitor standing in a horizontal case, it seems fair to assume that the rule proposed by the Government would extend to all horizontal competitor actions.

41. *E.g., Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private actions are "a significant supplement to the limited resources available to the Department of Justice").

42. Denying standing to Section 4 plaintiffs "does not leave society remediless, however, as both private equitable relief and government action are available." Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1139 (1976). *See* Pet.App. 4a n.1.

43. Excel freely admits that, in some respects, Section 16 standards differ from those of Section 4. *See* Pet.Br. 23. For example, lower courts have permitted indirect purchasers to bring actions for injunctive relief despite the rule of *Illinois Brick*. *See, e.g., In re Beef Industry Antitrust*

(footnote continues)

these considerations, courts in the past have permitted competitors to challenge horizontal acquisitions under Section 16.[44]

Although the legislative history of Section 16 itself is "thin," Congress clearly contemplated that private parties would play a meaningful role in safeguarding Section 7 interests.[45] That intent was confirmed in the 1980 Antitrust Procedural Improvements Act, which was accompanied by frequent statements that the amendments expanding Section 7 would enhance "the ability of the Department of Justice and *private parties* to challenge anticompetitive acquisitions."[46]

(footnote continued)

Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). Yet, there is no logical reason why Congress could have concluded that an indirect purchaser of strip steaks, *e.g.*, a restaurant patron, was a more appropriate plaintiff than Monfort to challenge the present acquisition.

44. The court of appeals could find no decision that had denied standing under Section 16 to a competitor plaintiff. *See* Pet.App. 11a. The Justice Department, as recently as 1983, also seemed to believe that competitors had standing to survive a motion to dismiss since its letter closing the investigation of Excel's proposed acquisition recited that "the court's findings" in Monfort's case "could result in a reevaluation of our position in this matter." Letter from Alan L. Marx, Antitrust Division of Dept. of Justice to James D. Moe, Cargill, Inc. (Oct. 25, 1983).

Contrary to the suggestion made in the amicus brief of the Business Roundtable, the Department did not approve the transaction. Rather, it cautioned that "the closing of our investigation should not in any way be construed as a judgment as to the lawfulness of this transaction." *Id.*

45. *See Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 651 n.11 (1977) (Stevens, J., dissenting) (quoting from legislative history that described Section 16 as protecting the businessman threatened with injury "by the unlawful acquisition of stock of competing corporations").

46. S. Rep. No. 238, 96th Cong., 1st Sess. 13 (1979) (emphasis added). *See also* H. R. Rep. No. 871, 96th Cong., 2d Sess. 7 (1980). This 1980 expression of congressional intent more than undercuts the suggestion of the Business Roundtable that permitting private challenges to acquisitions "is particularly anomalous" in light of the passage of the Hart-Scott-Rodino Act. Business Roundtable Br. 6.

In this case, the district court recognized that, as a practical matter, competitors are the most likely sources of private challenge to horizontal acquisitions. *See* Pet.App. 35a. Normally, a competitor participant in the market will have the best access to the type of industry information needed to mount an expeditious opposition. Unlike suppliers to the merging companies, a competitor will not fear jeopardizing its relationships with one of its customers and hence will be more willing to bring such an action. Likewise, customers of merging companies frequently will not have the incentive to contest such acquisitions because the products involved may constitute only a minor portion of the firm's overall expenses. As a consequence, challenges to horizontal acquisitions by these two classes of private parties have been even rarer than suits by competitors.

In the face of these considerations, the Government's proposal rests on a single, unsupported theoretical point. The Government posits that competitor suits *may* be wrongly motivated by an intent to prevent efficiency-creating acquisitions; therefore, permitting *any* such lawsuits is contrary to the purposes of the antitrust laws.[47]

In support of the accusation of "improper motivation," neither the Government nor Excel cites to a single

47. Gov.Br. 24. In its amicus brief in support of certiorari in this case, the Government also argued that competitor suits "are becoming increasingly and alarmingly common" and cited six such cases that had been filed in the last two years. Brief of United States as Amicus Curiae in Support of Petition for Certiorari, Nov. 1985 at 14 & n.20.

During this same period, the Justice Department estimates that there were approximately 4,800 acquisition transactions. *See* Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, U.S. House of Representatives at 5 (March 5, 1986).

In light of the previous, widely-accepted view that competitors had standing, this rate of competitor challenges (.125%) hardly suggests that courts have been or will be over-burdened with such actions.

such abusive lawsuit.[48] Given this dearth of evidence, it is hardly surprising that some have suggested that the critics of antitrust abuse may protest too much.[49]

The Government also argues that improperly motivated competitors can frustrate efficiency-enhancing mergers through the delay inherent in merely filing a lawsuit.[50] Gov.Br. 17. But filing a lawsuit prevents nothing, unless and until a district court issues a preliminary injunction upon plaintiff's showing of a likelihood of success on the merits or permanently enjoins an acquisition after a trial on the merits. Moreover, as the court of appeals observed, such proceedings can be expedited. Pet.App. 12a. Indeed, the instant challenge was tried and a decision rendered before the transfer date set forth in the acquisition agreement.

In short, there is no reason to accede to the Government's request for a universal rule barring all competitor challenges to horizontal acquisitions.

48. In fact, recent cases reflecting favorable results on the merits for competitors are set forth in the Brief for Respondent in Opposition to Excel's Petition for Writ of Certiorari at 21 n.21. Excel refers to the challenge by the Chrysler Corporation to General Motors' joint venture with Toyota. *See* Pet.Br. 24. Even in that case, however, Chrysler was not prevented from pursuing its claims. *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1187-93 (D.D.C. 1984). Indeed, it obtained modifications to the joint venture in addition to those secured by the FTC, which also had proceeded against the proposed venture. Wash. Post, Apr. 13, 1985, at F1. As for *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974), *see In re Cargill, Inc.*, 1973-1976 Trade Reg. Rep. (CCH) ¶ 21,059 (FTC 1975) (after Missouri Portland's private action proved unsuccessful, FTC initiated a proceeding to challenge the same acquisition, which was terminated when Cargill divested the stock).

49. Miller, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267, 267 (1985) ("the academic community may well be prone to overestimate" the potential for competitor abuse of the antitrust laws).

50. In the present case, the Government points to no efficiencies that would result from the proposed acquisition and recent empirical work suggests that, in general, acquisitions do not appear to enhance the operations of the merged firms. Ravenscraft & Scherer, *The Profitability of Mergers*, Working Paper No. 136 (Bureau of Econ., FTC, Jan. 1986).

F. Monfort Has Standing As A Supplier Of Fed Cattle

Two courts have concluded that Monfort had standing as a competitor to challenge the proposed acquisition. However, if this Court decides otherwise and denies standing to Monfort as a competitor, considerations of fairness require that it be afforded standing because the proposed acquisition also would threaten harm to Monfort in its role as a supplier of fed cattle.

Monfort brought this lawsuit and alleged standing as a competitor because no previous case had even suggested that competitors would not have standing under Section 16.[51] But it was no secret in the courts below that Monfort operated two commercial feedlots and was a substantial supplier of fed cattle. *See* Pet.App. 26a. While Monfort's own packing plants frequently consumed its fed cattle, the record showed that in 1982 Monfort sold approximately 28% of its cattle to unaffiliated packers and in 1981 such sales amounted to 55% of its sales. J.A. 446, 463. Moreover, Excel was clearly aware that the acquisition could have an impact on Monfort's cattle feeding operations and indeed demonstrated that fact at trial. *Id.* 291-92.[52]

Thus, apart from its status as a competitor, Monfort also was a supplier to the firms in the relevant markets. Even Excel concedes that such firms have standing to challenge this horizontal acquisition, Pet. 22, and, particularly in the procedural context of this case, there is no reason

51. "A plaintiff has undoubted standing to recover for injuries resulting from the antitrust violations of his 'direct' competitor. Such standing is so clear that it is seldom challenged. . . . " II P. Areeda & D. Turner, *Antitrust Law* ¶ 340a at 205 (1978).

52. The record also demonstrated that Monfort operated a food distribution subsidiary that sold Monfort's products as well as those purchased from unaffiliated suppliers. Pl. Ex. 2 at 15. If Monfort's own packing operations were curtailed, its distribution subsidiary would be forced to purchase boxed beef from the remaining packers.

why Monfort should be denied standing when it was threatened with the same anticompetitive effects.[53]

II. THE DISTRICT COURT'S FINDING OF A SECTION 7 VIOLATION WAS SUPPORTED BY AMPLE EVIDENCE

Excel does not ask this Court to review the correctness of the trial court's delineation of the relevant markets. *See* Pet. i, 25. Nor does Excel challenge the finding that Monfort's proof as to market shares, concentration levels, and the pronounced trend toward concentration established a prima facie showing that the probable effect of the proposed acquisition would be substantially to lessen competition.[54]

Instead, seeking refuge in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), Excel asserts that it proved that the market share and concentration data did not provide a reliable indicator of future market conditions. Unlike the defendant in *General Dynamics*, however, Excel failed to convince the district court of the factual merits of this claim. Thus, Excel is forced to argue that the lower courts "failed to take into account" the likely response of firms in other markets in the face of oligopoly pricing. Pet.Br. 34-35. Similarly, Excel and the Government contend that the district court's treatment of

53. It is well accepted "that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum* v. *Bacon*, 457 U.S. 132, 137, n.5 (1982); *Schweiker v. Hogan*, 457 U.S. 569, 585 n.24, (1982).

54. Indeed, the market share levels in this case are remarkably similar to those in *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-96 (1974) (post-acquisition, top two firms in Eastern Interior Coal Province would control 48.6% of the sales, the top 4, 62.9% and the top 10, 91.4%; the acquisition would yield an 8.0% increase in the sales of the top two firms, and the merged firm would control 21.8% of the sales). *Accord* IV P. Areeda & D. Turner, *Antitrust Law* ¶ 907 at 25 (1980) ("A merger of competing firms shall be presumed unlawful where their aggregate share of the market exceeds 13%.").

potential new entry into the relevant markets "ignored" the likely response to anticompetitive pricing, *id.* 35, and instead "focus[ed] solely on current profit margins," Gov.Br. 29.

The plain language of the district court's opinion reveals that Excel and the Government are wrong. The district court carefully considered the evidence relating to both the current state of the markets and likely future responses in the face of oligopoly pricing. In the end, the district court found that the factual underpinnings to Excel's theoretical arguments either did not exist or were unpersuasive. As a result, this appeal involves little more than an ill-disguised claim that the findings of fact and credibility determinations made below were erroneous.

A. The District Court Considered The Likely Responses Of Firms In Other Markets To Oligopoly Pricing Within The Relevant Markets

Excel purports *not* to challenge the factual findings underlying the trial court's relevant market determinations. Pet.Br. 37, 40-41. Instead, Excel claims the court limited its inquiry to what market participants "actually do" in today's competitive markets, rather than what they "could do" in the face of non-competitive pricing.[55] This claim finds no support in either the court's opinion or in the evidence Excel presents.

1. Input Market — Fed Cattle Procurement and Slaughter Facilities

At the outset, Excel argues that the district court mishandled the geographic component of the input market by

55. Pet.Br. 9, 39, 40. As the trial judge explained, in order for his analysis to be realistic, it must focus "on how manufacturers *actually would react* in a situation as well as how they could react." Pet.App. 58a (emphasis supplied). Thus, the court simply recognized that its inquiry as to the likely response of firms to future supracompetitive prices had to be guided by and be consistent with business reality rather than abstract theory. *See id.* 44a.

failing to take into account slaughter facilities located "east of the Rockies" and outside the twelve state region.[56] Specifically, Excel claims the court erred because it found "irrelevant" the testimony of three witnesses, including two sellers of fed cattle, that "if fed cattle prices were depressed, sellers would seek purchasers outside their *normal sales area.*" Pet.Br. 38 (emphasis added).

Excel cites nothing in support of its contentions that the court found such testimony "irrelevant." Indeed, the court relied on the testimony of the two fed cattle sellers (Knobbe and Weber) in connection with its geographic findings. Pet.App. 48a, 50a.[57]

Both of these witnesses did testify that if prices were depressed by an unspecified amount in their "normal sales area," they would seek sales outside that area. However, the only examples of "outside" sales they provided were made well within the twelve-state market. *See* Pl. Ex. 82 at 7 (sale outside "normal sales area" made 200 miles from Dorchester, Nebraska feedlot); Pl. Ex. 80 at 7, 36 (outside sales made 130 and 250 miles from West Point, Nebraska feedlot). Accordingly, the testimony of these witnesses only confirmed the district court's conclusion that, because of high transportation costs, the twelve state procurement market would not significantly expand "in response to an effort by current purchasers to depress the price of fed cattle." Pet.App. 50a.

Supplementing this finding, the court observed that "if the price of fed cattle within the twelve state region was artificially depressed, the limited capacity outside of the

56. Excel suggests that fed cattle prices tend to be uniform inside and outside the region, at least "east of the Rockies." Pet.Br. 38. The prices referred to are f.o.b. the commercial feedlot and do not include the cost, including weight loss, to transport such cattle to the slaughter facility. J.A. 588-90.

57. The cited testimony of the third witness, an employee of Excel, showed that he had purchased cattle in Texas and transported it to Dodge City, Kansas — both within the court's regional market. *See* J.A. 376.

region does not appear to represent a viable alternative for purchasing, slaughtering and fabricating the cattle fed within the region." Pet.App. 51a. Excel argues that the court erred in this regard because "[a]pparently the Court assumed that most — if not all — fed cattle would have to be sold outside the area in order to influence the fed cattle prices within the twelve states." Pet.Br. 39. But the court made no such assumption. Its point was that the plants outside the region had limited capacity, already utilized for slaughtering fed cattle, and Excel had not shown that there was sufficient excess slaughter capacity at these plants to accommodate a significant number of additional fed cattle from within the region — even if the substantial transportation costs that formed the principal basis of its findings were ignored. *See* Pet.App. 50a-51a.[58]

In sum, the court's analysis of the geographic component of the input market did not disregard any of Excel's evidence. Excel simply failed to convince the court that slaughterers located outside the twelve state region would exercise a meaningful disciplinary effect on the prospects for anticompetitive pricing within the region.

Excel also claims that the district court erred in analyzing the input market when it "simply regarded as irrelevant" testimony "(1) that there is little or no physical difference between fed and non-fed cattle slaughter facilities, and (2) that non-fed cattle slaughterers would begin purchasing and slaughtering fed cattle in substantial amounts if, as a result of fed cattle purchasers' oligopsonistic conduct, the price of fed cattle significantly dropped." Pet.Br. 40.

However, neither of the two witnesses on whom Excel relies described the potential magnitude of such a shift or even ventured a guess as to how "significant" such a price

58. Despite Excel's claim to the contrary, Pet.Br. 37, 39, the court did not find that slaughter facilities outside the twelve state region purchase 26 percent of all fed cattle sold. *See* Pet.App. 51a.

drop must be in order to generate a meaningful switch of cow and bull slaughterers into slaughtering fed cattle.[59] Once again, Excel's real complaint is not that the district court found its evidence irrelevant; the problem is that its vague generalizations were unpersuasive. Rejecting Excel's position, the district court found significant "physical differences" between fed and nonfed cattle slaughter facilities: the latter are smaller in size, lack economies of scale, and usually have no fabrication facilities. Pet.App. 45a-46a. Moreover, those differences, coupled with the reluctance of major customers to purchase from firms that slaughter a substantial volume of cows and bulls, convinced the trial court that

> firms currently slaughtering nonfed cattle would not significantly increase their purchases of fed cattle or switch to the slaughter of fed cattle in response to a decline in the price of fed cattle. . . . Any resulting increase in purchases of fed cattle would not provide a competitive check on the current purchasers of fed cattle.

Id.

59. The first witness on whom Excel relies was an operator of a captive fabrication plant for Wilson Foods. J.A. 86. At most, his testimony suggests that the putative price drop would have to be of sufficient magnitude to overcome the substantial hurdles that cow, bull and nonfed cattle slaughterers would face if they attempted such a shift. *See* J.A. 92-93 (acknowledging that some nonfed slaughter plants were not capable of handling fed cattle, while others would require the purchase of specialized operating equipment, and all might require a refocus of their marketing efforts).

The second witness was Excel's economic expert who offered even less information on the required level of a price drop or the magnitude of any shift that might result. J.A. 178-80. This is the same witness who testified that he could conceive of circumstances where the merger of the industry's three largest firms — Excel, Spencer *and IBP* — would not have anticompetitive effects. J.A. 433. The court noted that it had considered all of the experts but found those offered by Monfort to be more persuasive in that "they emphasized the actual conditions in the marketplace as well as the theoretical implications of the proposed acquisition." Pet.App. 41a-42a.

2. Output Market — Sales of Boxed Beef

Turning to the relevant output market, Excel advances similar unsubstantiated claims of error in the district court's analysis. First, Excel claims that the "evidence showed that ground beef fabricators could readily shift to the production of boxed or unboxed beef, and would do so if the price of boxed beef rose above competitive levels." Pet.Br. 41.

In this instance, Excel's evidence is not just vague and unpersuasive; it does not even discuss the fabrication of ground beef or whether that process is susceptible to a shift to the fabrication of boxed beef.[60] Under *General Dynamics*, the lower courts certainly are not required to deal with evidence that does not exist.

Excel also asserts the district court failed to appreciate the significance of the testimony of two grocery retailers, who were current and former employees of firms with captive fabrication facilities, "that they would increase their production, and reduce their boxed beef purchases, if boxed beef prices rose."[61] Excel argues that such a reduction in demand for boxed beef by integrated retailers

60. The cited testimony relates to firms that fabricate non-fed cattle, cows and bulls into primal and subprimal cuts. The trial court considered and rejected the argument that such firms would affect the market significantly in the event of higher boxed beef prices. Pet.App. 58a.

61. Pet.Br. 42. (The citation to Pl. Ex. 7R should be to Def. Ex. 7R.) Excel relies on two witnesses. One witness had been employed previously by a retailer that owned a boxed beef plant. He believed that his former employer would reduce its purchases of boxed beef and increase its purchases of carcasses in the face of a significant price increase by independent boxed beef suppliers. However, this witness also noted that his former employer was already fabricating at least 90% of its own requirements, suggesting that such a shift would not be significant. J.A. 569.

The second witness testified that if the price of boxed beef increased "significantly" in comparison to carcass beef, his integrated company would reduce its purchases of boxed beef and increase its purchases of carcasses for its own boxed beef facility. J.A. 596. No effort was made to define the size of a "significant" price increase that would lead to such a

(footnote continues)

would, in turn, discipline overall boxed beef prices of independent producers. However, Excel made no showing as to the magnitude of this reduction in demand if it were to occur. Indeed, the little evidence presented suggested that it would be negligible, because such integrated firms already produced most of their own demand. As one of the witnesses Excel cites acknowledged, the integrated retailer for whom he previously had worked "is basically buying carcass beef today. So whether [a price increase on boxed beef] would change their buying patterns or not is really questionable, because they're not in the boxed beef market heavily today, only as a fill-in."[62]

The evidence also showed that the number of captive fabrication plants was in decline, that the trend was expected to continue, and that once a retailer ceased producing its own boxed beef, it could not readily resume purchasing and processing carcasses. *See* J.A. 515-18; S.J.A. 123, 133. This evidence amply supports the court's conclusion that "this source of beef does not provide a competitive check on the relevant product market." Pet.App. 56a.

Excel cites to the same testimony of the same two integrated retailers in support of a different argument. This time the assertion is that "beef purchasers" testified that "even a small increase in the relative price of boxed beef" would cause them to shift to carcasses. Pet.Br. 41. Excel then argues that in the event of a small price increase "enough purchasers would switch enough of their purchases" to carcasses to force "boxed beef prices back to competitive levels." *Id.* 41-42.

(footnote continued)

shift or how substantial the shift would be. The witness was clear, however, that his company had no intention of supplying unaffiliated customers with any boxed beef that it produced. J.A. 598.

62. Def. Ex. 7R at 16. Excel does not claim that such integrated retailers would sell boxed beef to other customers in the event of a price increase and the evidence showed that they would not. J.A. 598.

The cited evidence, of course, provides no support for the proposition that any of the vast majority of customers that do *not* operate a boxed beef plant would even consider a change to carcasses. In fact, one of the witnesses Excel relies upon testified that a retailer, which had closed its boxed beef plant, "can't buy carcass beef because they're out of the beef fabricating business, *so they have to buy boxed beef* . . . . Carcass beef is really not a viable option to them because they're not equipped to handle it today." Def. Ex. 7R at 15, 17 (emphasis added). *See* J.A. 517-18, 532.

The district court reached the same conclusion when it analyzed Excel's broad assertions. It found that the substantial cost savings inherent in boxed beef, "such as reduced transportation costs, reduced labor costs and longer shelf life, contribute to the general superiority of boxed beef over carcass beef." Pet.App. 55a. In light of these facts, the district court properly rejected Excel's purported "showing" that a "small increase" in boxed beef prices would send non-integrated customers scurrying to buy carcass beef.

Finally, under the heading of "other factors," Excel identifies one that purportedly satisfies the rule of *General Dynamics* and therefore should have been found to have rebutted Monfort's prima facie showing of a violation. Pet.Br. 48. Excel again complains that "the opinions below never so much as mention" its alleged showing that

> [m]any fringe firms could *double* their present capacity by adding a second work shift, and the evidence showed that they would immediately do so if industry leaders attempted to depress fed cattle prices or raise boxed beef prices, thus making additional production by smaller firms profitable. J.A. 192, 289-90.

Pet.Br. 48 (emphasis in original). The so-called "failure" of the lower courts to "mention" this point becomes understandable when one looks at "J.A. 192, 289-90." This "evidence" consists of (1) the second-hand views of Excel's economist who cited a single example of double shifting — expansion by Monfort of the capacity of its Grand Island plant through an $8 million construction project (*see* J.A. 192), and (2) Mr. Monfort's testimony as to what would be required in the event his non-fringe company decided hypothetically to double shift a plant (*see* J.A. 289-90).

The cited evidence does not identify the "fringe" firms that Excel relies upon, or provide their location, or show how large they are, or establish whether they are already double shifting or simply going out of business with a single shift. Indeed, the evidence does not mention fringe firms at all and certainly does not show that "they would immediately do" anything. Excel had the obligation to produce evidence rebutting the showing of a violation; it was not the lower courts' responsibility to "mention" the absence of evidence.

B. Excel Did Not Establish That Entry Into The Beef Industry Is "Relatively Easy and Quick"

Excel suggests that a prima facie violation may be rebutted upon a showing that new entry into the relevant market "is relatively easy and quick." Pet.Br. 43. It then suggests that the district court erred in finding that entry barriers were "formidable." *Id.* 44.

Only a few decisions have accepted the controversial concept that low entry barriers can "save" a presumptively unlawful horizontal acquisition.[63] The controversy arises because this concept requires trading the beneficial effect of existing, actual competition between the merging firms

63. For an earlier discussion of a similar argument, *see United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.) *modified and aff'd*, 175 U.S. 211 (1899) (noting the suggestion "that local monopolies cannot endure long, because their very existence tempts outside capital into competition" but rejecting the argument that, because such potential competition would cure its abuses, the monopoly should be permitted).

for the uncertain discipline arising from potential competition — where the acquisition also confers additional market power on the acquiring firm.[64] The principal difficulty of administering this trade-off lies in the inherent uncertainty of identifying and quantifying entry barriers and then evaluating the likelihood of "quick and easy" entry into the markets. These are disputable questions, among both economists and legal scholars. *See* IV Areeda & Turner, *Antitrust Law* ¶ 917b at 87. In fact, their difficulty led Professors Areeda and Turner to conclude that only when the merging firms have a combined market share of 20% or less should "high freedom of entry" overcome presumptive illegality. *Id.* ¶ 907 at 26.

Even in the few decisions that have accepted a showing of "high freedom of entry," barriers to entry were so low as to be virtually non-existent. Excel relies principally on two cases. Pet.Br. 44. In *Echlin Mfg. Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,268 at 23,297 (FTC, June 28, 1985), the relevant market was the assembly of kits containing replacement carburetor parts and the record showed that one competitor entered the market by operating out of his home with an initial capital investment of $500. Similarly,

64. As Professor Alfred E. Kahn recently observed in commenting on horizontal mergers in the airline industry:

> I am unwilling to rely exclusively on potential competition. There have been five studies of air fares I know of since deregulation. Every one of them concludes that how many carriers you have in a market makes a difference. If entry were a sufficient discipline, you wouldn't see different fares whether there is one carrier in the market or five.

Wash. Post, Mar. 2, 1986, pp. F 1, col. 4, & F 6, col. 1.

In other words, there is a danger that potential competition may not succeed in preventing higher prices. This is because dominant, incumbent firms can anticipate and even control the rate of new entry. They can (1) risk the new entry attracted by high prices in order to reap higher profits in the interim before entry occurs; or (2) set high prices but demonstrate a willingness to make immediate and drastic price cuts to keep entrants out; or (3) engage in limit pricing, *i.e.*, set prices at higher than competitive levels but lower than the level needed to attract new entry. In each event, the result is the same — customers pay more than in a competitive market.

in *United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984), the trial court found that entry into the trash collection market was so easy that " '[a] person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself, and operate out of his home.' " *Id.* at 982 (quoting the district court).

Whatever the merits of these two decisions, the facts in this case are not remotely similar.[65] Here, the district court found significant barriers to entering the industry through the acquisition of existing facilities that could be expanded into effective competitive plants, because of a lack of such facilities and because substantial refurbishing costs would be required. Pet.App. 65a-66a. It also found that entry through the construction of a new facility would require a capital investment of $20 to $40 million in specialized beef packing assets, and that 18 months would elapse from the time of a decision to build a new facility until its completion. *Id.* 65a. Based on these facts, together with recent low profit margins in the industry and possible psychological barriers flowing from the high level of concentration of the industry, *id.* 66a, the court found "formidable barriers to new entrants." *Id.* 65a.[66]

Excel challenges virtually every one of these factual findings. First, Excel claims the finding as to the lack of facilities available for acquisition and expansion was based solely on the court's alleged misinterpretation of one Excel document. Pet.Br. 44-45. Excel insists that this document

65. Despite the almost non-existent entry barriers in these two cases, the decisions were not without their critics. *See Echlin Mfg. Co.*, 3 Trade Reg. Rep. at 23,305-11 (dissenting statement of Commissioner Bailey); Leddy, *Entry Issues in Merger Analysis*, 54 Antitrust L. J. 1257, 1258-59 (1986) (Deputy Assistant Attorney General, criticism of result in *Waste Management*).

66. The district court also found that a potential entrant could not expect assistance from a rapidly growing market or new technology. Rather, the court concluded that the mature nature of the industry would enhance the dominance of current industry leaders. Pet.App. 67a.

only related to the western cornbelt, and that "the evidence showed that unused plants were available for purchase and expansion elsewhere." *Id.* The evidence cited, however, does not show the availability of any such plants.[67] Indeed, it corroborates the testimony of Mr. Monfort, which the court relied upon in finding that there was a lack of facilities available for acquisition. Pet.App. 65a-66a.[68]

Second, Excel challenges the district court's finding that a delay of 18 months for the construction of a new facility would undercut the possibly ameliorative effects of potential entry. Pet.Br. 44. Aside from the fact that consumers could pay supracompetitive prices during that time, the 18-month period was measured from the moment a potential entrant perceived that the industry was earning excessive profits and decided to proceed with planning and construction for its own entry. Pet.App. 65a. But if Excel

67. Thus, Plaintiff's Exhibit 29 at Exhibit III, S.J.A. 293, lists five plants that are not "unused" but are operating, competitor facilities. The purchase of a competing facility obviously does not represent "new entry" but only the substitution of one competitor for another. Similarly, Plaintiff's Exhibit 31 at 1, *id.* 304, mentions three plants. But only one plant was "unused" and it was located *within* the western cornbelt at Estherville, Iowa. *See id.* 307. Finally, the testimony at Joint Appendix 91 and 97 refers to Val-Agri's previous purchase of two closed plants but sets forth no information as to the availability of other non-operating plants available after that purchase. Indeed, the recent acquisition of Swift by Val-Agri's owner, Edwin Cox, Jr., suggests that such unused capacity was lacking. *See* Thompson, *News Analysis*, Meat Industry, Dec. 1985, at 61.

Excel also quarrels with the district court's treatment of the fact that only one firm had entered the relevant markets in recent years. Pet.Br. 45. Contrary to Excel's assertion, the district court did not rely upon this fact to prove the existence of substantial entry barriers; it simply noted that entry by a single firm — Val-Agri — through acquisition of existing non-operating facilities did not indicate a *lack* of significant entry barriers. Pet.App. 67a.

68. Excel does not challenge the court's finding that acquisition and expansion would require substantial expenditures. In fact, Excel estimated that it would require more than $35 million and 18 months to acquire and expand a plant in Cozad, Nebraska. S.J.A. 228-29.

and IBP were to earn supracompetitive profits, possible entrants probably would not discover that fact for some time. *See supra* p. 3 n. 3. Thus, the impact of new entry, if it occurred, might not be felt for several years after profits had reached non-competitive levels, further supporting the trial court's conclusion as to the significance of the time required for the actual construction of a new facility.[69]

Third, Excel suggests that capital requirements in the range of $20-40 million for such a facility do not constitute a significant entry barrier. Pet.Br. 44 n. 24. Yet, compared to the capital requirements in the two principal cases Excel cites, the required investment for entry into beef packing represents, to say the least, a different order of magnitude.

Excel's argument misses the point in a more fundamental way. Not only is the size of the required investment significant, but so too is the specialized nature of the resulting assets. The mirror image of ease of entry is the concept of "ease of exit." *See United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 629 (1974). When entry can be accomplished only by the expenditure of substantial funds that cannot be recovered if the new entrant ceases production and leaves the market, then the risk of entry increases dramatically. The record in this case demonstrates that many assets required of a new entrant are highly specialized to the industry. J.A. 89. The potential losses in disposing of those assets thus buttress the district court's finding that the requirement of a $20-40 million investment for such assets posed a formidable barrier to

69. The district court also noted that a further amount of time would be required to achieve even a minimum level of market penetration. Pet.App. 66a. In a recent complaint, the Justice Department likewise alleged that "there are substantial barriers to entry" due to the need of a new entrant to "establish a reputation for the quality and reliability" of its product. *United States* v. *Baxter Travenol Laboratories, Inc.*, Civ. Action No. 85-C-09856, N.D. Ill., Nov. 22, 1985, ¶ 32 (market for fluid administration sets).

entry.[70] *See* S.J.A. 214 (loss on sale of Excel slaughter assets).

Fourth, despite these findings, Excel contends that the court erred by referring to current low profit margins and by allegedly ignoring what would happen "if profits in the defined markets rose to supracompetitive levels." Pet.Br. 44.[71] As its opinion indicates, the district court utilized, not ignored, the analytical tool of hypothesizing a future rise in prices and profits to supracompetitive levels. *See supra* p. 37.

However, the court's task was to assess the *likelihood* of future entry. Leddy, *supra* n. 65, at 1258. *See Marine Bancorporation*, 418 U.S. at 642. Consistent with this principle, the trial court's consideration of historically low profit margins reflected the common sense view that a possible new entrant would not expect supracompetitive profits to continue unabated after its entry.[72] In the real

70. Similarly, in a recent complaint, the Justice Department alleged that it would be difficult and expensive to enter into the market because "certain tooling used in the production of aviation lighting equipment is specialized to that use and is not useful for production of other types of equipment." *United States v. Cooper Industries, Inc.*, Civ. Action No. 85-0765, D.D.C., Mar. 6, 1985, ¶ 8.

71. *See also* Pet.Br. 46. Excel cites to its expert who testified that "the record of entry and expansion appears to indicate that were encumbents [*sic*] to attempt significantly to raise the prices of boxed beef or of other beef products, new entry and competitive expansion would be rapidly forthcoming." J.A. 194. But this expert provided the court with no explanation of what he meant by "significantly," i.e., must prices or profits rise 25%, 50%, or 100%? For the trial court's view of the vague theoretical testimony of Excel's experts, *see* Pet.App. 41a-42a. The court of appeals summed up Excel's entry argument as follows: "We may not retry the case here on the basis of speculative arguments. Nothing in the record suggests to us that the court's finding that entry barriers exist is clearly erroneous." *Id.* 17a.

72. *See* Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 Antitrust L.J. 307, 312 (1982) (the possible entrant "knows that the postentry price will almost certainly fall, either because of the added capacity or because existing sellers drop the price in response").

world, a potential entrant can be expected to look at the composition of the industry, particularly its leading firms, and the previous reactions of those industry leaders to smaller rivals. Where a potential entrant must invest substantial sums in specialized assets, anticipation that incumbent firms will greet its entry with hostility can be a substantial deterrent:

> This risk of losing unrecoverable entry costs, as perceived by a potential entrant, can be increased by the threat (or the imagined threat) of retaliatory strategic or tactical responses of the incumbent.[73]

Indeed, the trial court in the present case found a "distinct possibility" that the acquisition would lead to a predatory cost-price squeeze that would drive smaller rivals from the market. Pet.App. 71a. To argue that the court should have disregarded such historical experience as irrelevant to the likelihood of future entry — even in the face of supracompetitive prices and profits following the cost-price squeeze — is to elevate abstraction over reality. *See supra* p.29 n.39. Even if Excel's attorneys are unwilling to come to grips with reality, however, its business executives were not. They concluded that entry would not be "quick and easy."

> We do not anticipate any increase in competition within the foreseeable future for two reasons: poor profitability within the business, and large capital requirements needed for new plant and equipment.

S.J.A. 359.

73. Baumol and Willig, *Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly*, 46 Q.J. Econ., 405, 418 (1981). *See also* Dixit, *Recent Developments in Oligopoly Theory* 72, Amer. Econ. Rev., No. 2, at 12, 12-13 (1982). Kreps & Wilson, *Reputation and Imperfect Information*, 27 J. Econ. Theory 253, 253-54, 277 (1982); Milgrom & Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. Econ. Theory 280, 302-04 (1982).

CONCLUSION

Section 7 of the Clayton Act and this Court's prior interpretations thereof exhibit a consistent, unbroken concern for arresting horizontal acquisitions that pose an incipient threat of anticompetitive consequences. Monfort's trial proof established that the proposed acquisition transgressed that standard. Excel had the obligation to rebut Monfort's showing and the trial court allowed it every opportunity to do so. But the district court concluded, after considering all of the evidence and all of the arguments Excel now presents, that the proposed acquisition violated Section 7. This conclusion, affirmed on appeal, is fully consistent with prior interpretations of Section 7 of the Clayton Act. If Excel does not approve of the statute, as written, it is free to join the Administration in urging Congress to amend it. However, absent such a change in the statute, there is no reason to disturb the decisions of the lower courts.

For the reasons stated in this brief, the decisions of the courts below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

(13)

No. 85-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARGILL, INC. AND EXCEL CORPORATION,
Petitioners,

v.

MONFORT OF COLORADO, INC.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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RULE 28.1 STATEMENT

An amendment to Petitioners' Statement Pursuant to Rule 28.1 has been filed separately from this brief.

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TABLE OF AUTHORITIES

ARGUMENT

The Brief for Respondent Monfort of Colorado, Inc. distorts both the record below and the questions presented for this Court's decision. With respect to injury, the question before this Court is whether Monfort's theory and proof presented at trial made out the kind of harm to Monfort necessary to support relief under Section 16. In its arguments below, Monfort contended that the acquisition would contribute to a cost-price squeeze precisely because it would enable Excel to achieve multi-plant scale efficiencies that Monfort does not share. Monfort—as the District Court observed—declined to characterize the cost-price squeeze as predatory. Monfort now asserts, however, that after the acquisition Excel would engage in a scheme of targeted predatory pricing, focussed on cattle-procurement in the area of Monfort's Grand Island, Nebraska plant, in an effort to force Monfort to adhere to a possible future oligopoly pricing scheme. The contention appears for the first time in this Court, has no credible support in the record, and, indeed, is inconsistent with the District Court's finding of a twelve-state procurement market. In short, Monfort's effort here, for the first time, to articulate a theory of predation—as well as its effort to assert harm as a fed cattle supplier—is belied by the record below, and illustrates as clearly as possible the danger to competition posed by the relaxed concept of antitrust injury the courts below adopted.

On the Section 7 merits, Monfort argues that the only question presented is whether Excel's evidence succeeded in overcoming the presumption of illegality established on the basis of market definitions and market shares. In fact, Excel consistently has contended that no such presumption was proper here. The likelihood of oligopoly pricing both in the procurement of fed cattle and in the sale of boxed beef can be gauged accurately only by taking into account the supply and demand responses of firms in immediately

adjacent beef industry sectors. Of course, market definition is always a matter of degree, and lines, sometimes arbitrary, must be drawn. But this inevitable imprecision cannot explain the lower courts' complete failure to take such supply and demand responses into account in assessing the likelihood of oligopoly pricing. In short, because they gave *no* weight to the competitive responses of firms in immediately adjacent industry sectors to the possibility of oligopoly pricing in the narrow markets the District Court defined, the lower courts failed to make the kind of analysis that Section 7 and this Court's decisions require. By the same token, by failing to take into account the likely supply response of the multitude of small firms that already buy fed cattle and sell boxed beef—a supply response unambiguously established on the record here—the lower courts gave the concentration statistics in the District Court's narrow markets a competitive significance they simply do not have.

I. MONFORT FAILED TO ESTABLISH ANTITRUST INJURY

Monfort contends that the only *Brunswick* question presented to the Tenth Circuit and therefore before this Court is whether it can advance a claim of possible harm sufficient to meet Section 16's antitrust injury requirement, without regard to whether the claim finds any credible support in the record.[1] From this premise, Monfort asserts

[1] Relying on a footnote in the Court of Appeals opinion, Monfort asserts that Excel's appeal briefs contended only that Monfort had not *alleged* antitrust injury, and did not contend that whatever injury it alleged had not adequately been proved. This is incorrect. Excel's briefs on appeal explicitly argued that, on the evidence of record, *any* harm to Monfort was speculative, that no causal relationship to the acquisition had been shown, and that, in any event, the kind of harm Monfort claimed, and purported to demonstrate at trial, did not constitute antitrust injury under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *E.g.*, Brief for Appellants at 19-33; Reply Brief for Appellants at 19-25. In short, Excel explicitly contended that Monfort had failed either to allege or to demonstrate antitrust injury. The Court of Appeals appeared to acknowledge this, in the footnote to which Monfort refers, in observing that Excel challenged the District Court's findings with respect to injury. In any event, there is no possible question that the Court of Appeals concluded that the record established antitrust injury, under the predation theory it formulated, based on increased market shares and Monfort's prediction of a cost-price squeeze. Indeed, in holding that allegations to this effect were sufficient, the Court necessarily held that proof of the allegations equally was sufficient to establish the claim. This is, of course, exactly what Excel questioned in its petition for certiorari to this Court, and Monfort's response to that petition in no way suggested that the question had not been raised and decided below.

antitrust injury here on two possible theories. First, it proposes a variant of the Tenth Circuit's predation theory, claiming that predation against an "equally efficient" rival is really what it was complaining about all along. Second, Monfort now claims that even if it would not be injured as a competitor, it might be injured as a fed cattle supplier.

Both of these claims are advanced for the first time in this Court. Both lack any basis in the record. As Excel's opening brief observed and as the *amicus* brief for the United States strongly emphasized, competitor suits pose a serious danger to efficiency-enhancing mergers and, ultimately, to sound enforcement of the antitrust laws precisely because of the likelihood that competitors will attempt to characterize a probable increase in competition as anti-competitive. The danger to competition can be avoided only if plaintiffs are required both to allege and to show market circumstances giving rise to a genuine threat of anti-competitive harm to themselves. The record reveals no such danger here.

A. Monfort Claimed Harm Below From Competition, Not Predation.

As Excel's opening brief pointed out, Monfort's theory and principal evidence of possible injury were presented through the testimony of Mr. Monfort. Mr. Monfort tes-

tified that following the acquisition, Excel and IBP would "each seek aggressively to increase its share of the market," and that this competition would result in a progressive narrowing of the industry's profit margins. J.A. 285. Simply put, the cost-price squeeze Mr. Monfort feared would be "the result of competition." J.A. 287. Based on this testimony, the District Court observed that Monfort did "not contend that predatory practices would be engaged in by Excel," Pet. App. 32a;[2] instead, Mr. Monfort claimed injury only from a predicted acceleration in the process of competition that, he testified, had been going on "throughout the industry for the last 20 years." J.A. 286.

In its motion to dismiss at the conclusion of Monfort's case and in its appeal to the Tenth Circuit, Excel contended that the theory and proof of injury thus presented failed to establish the kind of harm required for Section 16 relief: first, the evidence failed to show any causal link between the acquisition and the "heightened competition" (Pet. App. 70a) Monfort claimed to fear; and second, even if the acquisition did cause "heightened competition," any consequent harm to Monfort was not of the kind the antitrust laws were intended to prevent.

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[2] Monfort suggests that the District Court was merely stating the truism that Monfort could not necessarily predict what Excel might "in fact" do in the future. Resp. Br. 24 n.29. But at no point in the proceedings below did Monfort claim that the acquisition would increase the likelihood of predation by Excel. Consequently, Excel has never characterized Monfort's claim as one of predation. In the Pretrial Order Monfort cites (Resp. Br. 22 n.25), Excel flatly stated that Monfort's injury theory, as articulated, "cannot serve as the foundation for a legitimate antitrust claim," noting that such a claim would "requir[e] some sort of joint tacit 'predatory activity' by Excel and IBP." Pretrial Order at 16. But Monfort never made such a claim. That is why the District Court—on the very page Monfort now cites in support of its predation theory—repeats its earlier observation that Monfort "does not allege" predation in this case. Pet. App. 71a.

In response to the first argument, Monfort attempted to show a causal link between the acquisition and "heightened competition" that might threaten its profits by pointing to *one* fact and one fact alone—that the acquisition would give Excel multi-plant scale efficiencies and hence would allow it to operate at a lower cost than less efficient rivals, including Monfort itself. Thus, Monfort's trial brief stated: "[T]he Spencer acquisition would give Excel the opportunity to operate at a lower cost solely by reason of multiplant economies flowing *directly* from its illegal acquisition of Spencer." Plaintiff's Trial Brief at 54 (emphasis in original). Monfort's brief on appeal was even more explicit: "The evidence at trial revealed significant economies associated with multi-plant operations in the beef industry . . . These are the same multi-plant economies that Excel attempted to obtain from the Spencer Beef acquisition, *and that would enable Excel to engage in the cost-price squeeze*." Brief for Appellee at 42-43 (emphasis added).[3]

The record thus demonstrates that Monfort never predicted nor purported to show that the cost-price squeeze would be predatory—*i.e.*, that the acquisition would enable Excel deliberately to buy fed cattle and sell boxed beef at a loss in order to drive equally efficient rivals from the market and achieve a monopoly position.[4] To the contrary,

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[3] To be sure, as Monfort's Response observes, Excel did not attempt to defend the acquisition on the Section 7 merits by pointing to efficiencies that the acquisition would allow it to achieve. But Monfort itself attempted to show such efficiencies, in order to establish a causal link between the acquisition and harm to itself, relying on evidence of significant efficiencies in the testimony both of Excel's officers and of Monfort's own economist. *E.g.*, Brief for Appellee at 42 (citing, *inter alia*, J.A. 74-75; 369-70).

[4] Mr. Monfort's deposition testimony regarding "below-cost pricing" is not to the contrary. *See* Resp. Br. 6. Monfort did not introduce that testimony in its case-in-chief, nor even make reference to it prior to this brief. Instead, the testimony was introduced by Excel as part of

Monfort's prediction of injury explicitly was based on a fear that multi-plant efficiencies would give Excel lower costs, allowing it to buy fed cattle for more and sell boxed beef for less, thus increasing its market share and threatening Monfort's profits. This is the theory that the Court of Appeals found to make out "a form of predatory pricing," despite the fact that it is perfectly consistent with competitive conduct.

B. Monfort's Effort To Support The Court Of Appeals' Predation Theory Has No Basis In The Record.

Flatly contradicting its arguments and evidence below, Monfort's Response sets out a complex scenario attempting to explain how an increased likelihood of oligopoly pricing could lead to a possibility that it would be harmed. After the acquisition, according to Monfort, Excel would want to engage in oligopoly pricing, which necessarily requires a cooperative, market-wide reduction in output. At the same time, Excel would want to increase its relative market share. Monfort, however, would refuse to reduce its output. Moreover, it certainly would refuse to capitulate to Excel's desire that rivals not only reduce their output, but do so by a larger proportion than Excel. To compel

its proof that the "cost-price squeeze" was simply intense competition, and thus could not result in antitrust injury to Monfort. In this regard, Mr. Monfort testified as follows:

> Q: Do I understand correctly that . . . selling below cost, then, is not essential to the cost/price squeeze mechanism['s] success, is it?
>
> A. Maybe not, depending upon the *efficiencies the plants have and the bookkeeping* . . . *Cargill* [*has*].

J.A. 668 (emphasis added). As noted above, Monfort (until now) has consistently contended that the acquisition would enable Excel to operate at a lower cost than Monfort because of greater efficiencies. As to Excel's costs, Mr. Monfort frankly admitted, "I have no knowledge of how Excel/Cargill keeps their books. So what might be below cost for me might, in fact, not be below cost for them." J.A. 667.

a reluctant Monfort to cooperate, the scenario concludes, Excel would have to engage in predation directed against Monfort, an equally efficient rival. Excel could do this by operating the plants acquired in the Spencer acquisition at a loss, artificially raising fed cattle prices in the neighborhood of Monfort's Grand Island, Nebraska plant, while simultaneously operating the rest of its plants at a profit. Resp. Br. 6-7.

Monfort's newly formulated claim at least seems to acknowledge, contrary to its position below, that oligopoly pricing, in and of itself, could never injure a competitor. As this Court recognized in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1354 (1986), oligopoly pricing could only benefit competitors by allowing them to operate beneath its umbrella. As in *Matsushita*, therefore, Monfort's injury, if it is to satisfy the *Brunswick* test, must flow from predatory conduct.[5] But the critical question still remains: Do the market circumstances here demonstrate that predation is a genuine risk? They clearly do not:

1. As discussed above, the record conclusively demonstrates that Monfort's fear of injury stemmed not from below-cost pricing, but from the possibility that the acquisition would give Excel cost advantages that Monfort does not share.

2. To be sure, Excel's documents show that it *did* want to increase its share of the market. But this desire in no way demonstrates an intent to engage in predation. To

[5] For this reason, Monfort's reliance on *Blue Shield of Virginia, Inc.* v. *McCready*, 457 U.S. 465, 483-84 (1982), is misplaced. The interests of the plaintiff in *McCready* were entirely congruent with and derived from those of the psychologists who were the direct target of the antitrust violations charged and who undeniably were injured by the alleged anticompetitive conduct. Here, by contrast, Monfort's economic interests as a competitor are directly contrary to those of the cattle sellers and beef purchasers who would be injured by oligopoly pricing.

the contrary, it is perfectly consistent with competitive conduct and, moreover, inconsistent with oligopolistic behavior. In fact, when Mr. Monfort was asked whether he wanted to increase Monfort's market share, necessarily at the expense of rivals large and small, he responded: "Yes. I am normal." J.A. 280.

3. To show Excel's supposed propensity to engage in predation, Monfort points solely to the fact that some of Excel's plants operated at a loss in 1980-81. J.A. 365-66; S.J.A. 348. But any firm on occasion may continue to operate plants, even at a loss, during a cyclical or temporary business downturn because the loss incurred in doing so is less than the costs associated with closing and then reopening the plants. Indeed, the record reveals that Monfort operated at a loss in 1980 as well. J.A. 457.

4. Monfort's theory that Excel could use the Spencer plants to drive Monfort out of business without affecting Excel's operations in Kansas and Texas flatly conflicts with the District Court's finding that *all* of these plants are included in a single twelve-state procurement market—a market definition that Monfort itself proposed. If the plants are in a single market, it would, of course, be impossible for Excel to pay artificially high prices for fed cattle in the area around Monfort's Grand Island plant without affecting the price of fed cattle in Texas and Kansas. The very essence of a "market" is that prices within it tend to uniformity; long-term price discrimination, of a kind essential to Monfort's new predation theory, is impossible. Stigler and Sherwin, *The Extent of the Market*, 28 J.L. & Econ. 555 (1985). In short, Monfort cannot have it both ways. Either the District Court's twelve-state market is correct, in which event Excel could not engage in targeted predation against Monfort's Grand Island plant, or cattle procurement markets are local, in which event the District Court's analysis of market shares and concentration is wrong.

5. In *Matsushita*, this Court recognized that a dominant market share is a prerequisite to successful predation: "If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the [predation] conspiracy can continue to sell at the 'real' market price, and the conspirators suffer losses to little purpose." 106 S. Ct. at 1358. Monfort argues, however, that while this "may be true where the would-be predator's share is so small that other competitors can ignore its low prices," it is "counter-intuitive" here, because "where there are but a few significant firms in the industry, competitors will be aware of and react to the efforts of one another so that the action of a single substantial rival can affect overall market prices." Resp. Br. 26. Thus, according to Monfort, Excel's twenty percent share would give it enough "market power" to engage in successful predation.

But in finding *Matsushita* difficult to accept, Monfort again confuses oligopoly pricing with predatory pricing. It is true that firms with relatively modest market shares can, by charging prices closer to the competitive level, drain enough business away from cartel members to induce them to lower their prices as well. It does not follow, however, that rivals of a would-be predator would deliberately price below the competitive level, intentionally suffering losses, merely because the predator has done so. A firm cannot drive the price down to the point of destroying its rivals unless it can expand market supply beyond the competitive level; thus, it must be able to supply both the increase in demand that its below-cost pricing generates and, at minimum, a substantial fraction of all of its competitors' share of demand as well.[4] A twenty percent firm could not bring about such a substantial expansion of out-

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[4] Indeed, if the predator's rivals seek to reduce their losses by cutting back production until the storm passes, the predator will have to increase its output (and hence its losses) even further to meet that additional demand. R. Bork, *The Antitrust Paradox* 149, 152 (1978).

put.[7] For exactly this reason, the lower courts and commentators have almost universally assumed that predation is a genuine threat only when a would-be predator already has a dominant market position.[8] *See Matsushita*, 106 S. Ct. at 1355 n.8.

c. Excel's opening brief pointed out that predation could be successful only if the beef industry were characterized by entry barriers substantially greater than, and different from, those found by the courts below. Monfort's only response to this is a suggestion that *if* predation were to occur, that fact itself might tend to make potential entrants wary. Resp. Br. 29 n.39. But the threat of predation can only deter entry if the threat is credible, and credibility depends on whether a predatory strategy is economically feasible. *See* McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289, 298-99 (1980). Thus, as one of the sources relied upon by Monfort put it, "It is hard . . . to establish fear of predation as an entry barrier, as hard if not harder than establishing it as an antitrust violation in the first place." *Panel Discussion*, 54 Antitrust L.J. 1271, 1275-76 (1986) (M. Leddy). It is doubly hard to do so where, as here, no predation has occurred. Excel's point remains: reentry would be quick and easy under Monfort's injury hypothesis because of the availability of unused plants, and this is especially so if, as Monfort now insists, slaughter/fabrication plants are highly specialized assets and cannot readily be converted to other uses (Resp. Br. 47). *See* McGee, 23 J.L. & Econ. at 296. In short, the plants would continue to exist and their present or new owners would

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[7] Perhaps Monfort means to suggest that other firms would also expand output because of a joint interest in predation. But if so, the suggestion adds simply another layer of speculation to Monfort's already highly speculative theory. *Tacitly* coordinated predation presents all of the difficulties *Matsushita* identified and more, both in coordinating the predatory output expansion itself, and subsequently in coordinating an oligopolistic output reduction. 106 S. Ct. at 1357-60.

[8] *See* authorities cited in Gov. Br. 20 n.27 and Pet. Br. 31 n.15.

have every incentive to reopen them once the would-be predator raised prices and attempted to recoup its losses. *Id.*

Monfort attempts generally to bolster its new predation theory by asserting that Section 7 is concerned not only with oligopoly pricing, but also with preventing monopolizing conduct, and is designed to address both of these concerns in their incipiency. But this says nothing about the question before the Court. To show that the acquisition violated Section 7, Monfort relied exclusively on this Court's horizontal merger standards, and their concern with identifying a substantially increased likelihood of oligopolistic conduct. But to obtain relief under Section 16, Monfort had to establish not only a violation, but also that that violation genuinely threatened it with injury of a type the antitrust laws were intended to prevent. Based on this, Excel consistently has made the following points:

First, oligopoly pricing, the sole basis of violation advanced by Monfort here, could not injure Monfort at all.

Second, although Monfort might be injured if the acquisition led to increased competition, that injury would not be antitrust injury. This is not, as Monfort suggests, a matter of "labels." Resp. Br. 22. It is the very essence of the antitrust injury requirement. A competitor's action to prevent increased competition, especially if it results from increased efficiency, is precisely the sort of anticompetitive action that the *Brunswick* requirement is designed to prevent.

Finally, the only other possible source of injury to Monfort—that the acquisition would enable Excel to engage in predation—cannot support Monfort's position because the circumstances here do not begin to suggest that predation is a genuine threat. Absent such a threat, the *Brunswick*

test is not satisfied.[9] This has nothing to do, however, with whether, as a matter of substantive law, Section 7 is an "incipiency" statute that "extends beyond" Section 2 of the Sherman Act. Instead, it has to do with preventing debasement of *Brunswick's* antitrust injury requirement, and with Section 16's general requirement that a plaintiff demonstrate a genuine threat of anticompetitive harm to itself.

Under the Court of Appeals' injury holding, any rival of two merging companies would be able to challenge and potentially block a merger for anticompetitive reasons simply by voicing a claim that predation "might" occur. This is exactly what Monfort has done in its Response. Monfort's effort now to convert its injury claim from a fear of heightened competition to a supposed fear of predation illustrates as clearly as possible the danger to competition that would result from failure strictly to apply *Brunswick*'s injury test. The facts of record fail to establish any genuine threat that Excel could or would engage in predatory conduct. Indeed, any such risk is exactly contrary to the "heightened competition" Monfort predicted below, and on which alone it relied to show that the acquisition threatened it with harm.

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[9] No extended response is required to Monfort's effort to perpetuate the Court of Appeals' misconception (Pet. App. 8a-9a) that "Excel and its economic authorities . . . characterized predatory pricing as 'pure competition.'" Resp. Br. 23 n.27. The point made by Excel and by Professor (now Judge) Easterbrook—which the Court of Appeals quoted—was only that "it is exceedingly *hard to distinguish* 'predatory' strategies from ordinary competition." Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 266 (1981) (emphasis added). Mr. Monfort made the point succinctly; when asked whether the cost-price squeeze is predatory, he replied, "No. There are those that went out of business that probably thought it was. I don't happen to think it was." J.A. 634. Thus, as this Court recognized in *Matsushita*, 106 S. Ct. at 1360, it is vitally important to distinguish competition from predation, since failure to do so would permit competitors to misuse the Section 16 remedy to anticompetitive ends.

C. Monfort's Supposed Status As A "Cattle Supplier" Does Not Establish Antitrust Injury.

In a final effort to overcome its difficulties with *Brunswick*, Monfort argues that it "has standing as a supplier of fed cattle." Resp. Br. 34. At no prior point in this litigation, however, has Monfort contended or even suggested that it would suffer injury "as a supplier of fed cattle." The record demonstrates why this is so. Monfort's Response states that it sold some of its fed cattle to third-parties in 1981 and 1982. *Id.* What Monfort fails to reveal is that those sales took place when Monfort's Greeley, Colorado beef packing plant was closed as a result of labor relations problems. Def. Ex. 7W at 87-88. More importantly, at the time of trial in 1983, Monfort consumed *all* of the cattle from its feedlots internally, and Mr. Monfort testified that "[it] is no longer our practice" to sell fed cattle to other slaughterers. *Id.* at 17, 87-88.

Monfort's new assertion of injury as a supplier of fed cattle plainly conflicts with its assertion of harm as a competitor. Because Monfort supplies, and intends to continue to supply, fed cattle only to itself, it could not be affected by other fed cattle purchasers' efforts to reduce their purchases and thus depress fed cattle prices. Indeed, any such oligopsony scheme would allow Monfort, the third largest slaughterer in the industry, to benefit from increased beef prices or to increase its market share. By the same token, because of its position as a vertically integrated supplier/slaughterer/fabricator, a predatory elevation of fed cattle prices, even if it were possible, could not succeed in driving Monfort out of business. Indeed, Monfort might very well choose, as a supplier, to sell some of its fed cattle at the artificially high prices, and benefit greatly as an enterprise.[10]

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[10] Monfort's cursory suggestion in a footnote that its ownership of a "food distribution subsidiary" might give it standing to challenge the

Monfort's new supplier theory of injury is simply an effort to deprive the antitrust injury requirement of any rigor whatsoever. Monfort seems to think that, if one injury theory does not work, another can be put forward in its place, regardless of consistency with its previous claims or its theory on the Section 7 merits. Monfort's injury theory below, resting on increased efficiencies and enhanced competition, plainly is not the antitrust injury *Brunswick* requires. Its predation theory here has no foundation in the evidence and contradicts its claims below. Finally, the record demonstrates that Monfort could suffer no injury as a fed cattle supplier. In sum, under no theory has Monfort demonstrated that the acquisition would cause it any risk of harm of "the type the antitrust laws were intended to prevent and that flows from that which makes the [acquisition] unlawful." *Brunswick*, 429 U.S. at 489.

II. THE COURTS BELOW APPLIED ERRONEOUS LEGAL STANDARDS IN HOLDING THAT THE ACQUISITION VIOLATES SECTION 7

In any Section 7 case, the ultimate question is whether, in the words of the statute, the effect of an acquisition "may be substantially to lessen competition." 15 U.S.C. § 18 (1982). The answer to the question will depend on the particular facts, but the facts must be analyzed in light of standards that are consistent with the statutory purpose—to prevent those acquisitions that seriously threaten either to create monopoly power or substantially to increase the likelihood of collusive or interdependent conduct. Excel believes that the lower courts failed to apply such standards here, with respect to market definition and

acquisition (Resp. Br. 34 n.52)—another argument that Monfort never advanced below—is equally unsupported. The single record reference to the subsidiary indicates that it sells Monfort's products and "certain allied food products" of unaffiliated companies. Pl. Ex. 2. at 15. At no point does the document indicate what these "food products" are, much less state that the subsidiary is marketing other producers' boxed beef.

entry barriers, as well as with respect to factors that, under *United States* v. *General Dynamics*, 415 U.S. 486 (1974), overcome a presumption of anticompetitive effects. Monfort argues, however, that on all of these points Excel failed not because the lower courts applied the wrong analysis, but because Excel failed to supply the necessary proof. Monfort is incorrect.

Excel's evidence and arguments in the courts below rested on certain basic economic perceptions. Briefly put, oligopoly pricing necessarily implies some reduction in market output. The leading firms in a market therefore can successfully engage in oligopoly pricing only if other firms, attracted by supracompetitive profits, cannot make up the output reduction and thus force prices back to competitive levels. *See Matsushita*, 106 S. Ct. at 1357. Such "other firms" may include (1) firms that supply the product in adjacent geographic areas; (2) firms that produce close substitutes in terms of customer demand; (3) firms that can convert their existing facilities to production of the product; (4) firms that could enter the market *de novo*; and, perhaps most importantly, (5) small firms, already in the market, that could readily increase their output. Defeat of an oligopoly pricing effort does not require, as the District Court appeared to assume, a uniform or massive response by all of those firms or even by all firms within a single category. The critical question is whether the possible responses of *some* such firms would be sufficient, in the aggregate, to make up for the oligopolistic output reduction. *See, e.g., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983). If so, the market leaders' attempt at oligopoly pricing would cause them to suffer a substantial—possibly permanent—reduction in their sales; in short, oligopoly pricing would be unlikely to occur.

The basic problem here is that the District Court attempted to infer the likelihood and magnitude of present and potential competitors' responses by looking exclusively

to what they appear to do under the intensely competitive market conditions that now exist. To be sure, the District Court stated, at certain points, that various competitor responses would not be "significant" even if fed cattle prices were artificially depressed and boxed beef prices were artificially raised. But the reasons the court offered uniformly depended on observations of current market behavior, despite clear evidence that, were oligopolistic conduct to occur, behavior would change dramatically.

1. *The "cattle procurement" market*: The District Court's opinion leaves unanswered an obvious question: Why are all fed cattle purchasers within the twelve-state area included in a single market while other such purchasers, even in adjacent states, are not? Cattle sellers at trial testified, as Monfort concedes, that if cattle prices were depressed, they would ship their cattle greater distances, and nothing would prevent cattle sellers on the fringe of the twelve states from selling to buyers in adjacent areas. The District Court made two responses to this point, which Monfort repeats here. First, transportation costs are high relative to the "small profit margins in this industry." Pet. App. 50a. Second, purchasers outside the area could not make sufficient purchases to affect prices within the area. But oligopoly pricing necessarily would cause purchases of, and prices for, fed cattle within the twelve-state area to decline; hence, to protect their "small profit margins," cattle feeders would be willing, as they testified at trial, to transport cattle far beyond the 75 to 100 mile range that is normal under competitive conditions.[11] Moreover,

[11] To be sure, as Monfort notes, two cattle feeders testified that they have shipped cattle only as far as 200 to 250 miles from their feedlots. But if the small price divergences that characterize a highly competitive industry induce these shipments of 100 to 150 extra miles, it necessarily follows that oligopsony price divergences would expand the cattle feeder's "sales area" significantly. Indeed, the cattle feeders testified that they were aware of fed cattle prices throughout that portion of the country east of the Rockies, but that those prices currently tend to be uniform. Pl. Ex. 80 at 9-10; Pl. Ex. 82 at 12.

while the District Court found that 74 percent of all fed cattle are "marketed" and presumably slaughtered in the twelve states (Pet. App. 51a), this necessarily implies that 26 percent are marketed and slaughtered elsewhere—a substantial share of industry capacity. The point remains: If Texas, Colorado, and Illinois are, as the District Court found, all in a single cattle purchasing market, why is Indiana excluded? And if Indiana, why not Ohio and Michigan?

A simple example illustrates the fundamental flaw in the District Court's geographic market definition. Two grocery stores, A and C, separated by thirty miles, each draw customers exclusively from an area within a radius of fifteen miles. At first glance, the two may not appear to compete. But there is a third store, B, equidistant between A and C. It competes with both. If A and B attempted to collude, B would lose customers to C, and the collusive effort would collapse. This is the reasoning that had to support the District Court's conclusion that, although cattle procurement is relatively localized under competitive conditions, the twelve states constitute a single market. But the same reasoning necessarily requires inclusion in the market of all adjacent areas, absent some demonstration of a discontinuity—some barrier to transactions between the twelve states and adjacent areas that does not equally exist within the twelve-state area itself. No such discontinuity exists here. Indeed, the only apparent rationale for the twelve-state market is that it happens to encompass the plants of IBP, Spencer, Excel and Monfort, and thus exaggerates the acquisition's effects on "market" shares as much as possible.

2. *The "beef" market*: Excel introduced evidence to show that if leading boxed beef producers together attempted to raise their prices significantly above competitive levels, some purchasers would shift some of their purchases from boxed beef to carcasses—enough so that prices would be forced back to competitive levels. Moreover, beef buyers

themselves compete for sales to ultimate consumers. If boxed beef prices were elevated artificially, retailers that buy boxed beef would lose sales to retailers that buy carcasses and fabricate them themselves. In consequence, demand for boxed beef would decline, and the boxed beef producers' effort to price oligopolistically would be defeated. For exactly these reasons, the prices of boxed and carcass beef move in near perfect synchrony (Tr. 493-95; Def. Ex. 70); they are, economically, in the same market.

The District Court rejected this analysis, and the evidence on which it was based, for three principal reasons, all of which Monfort repeats here. First, many retailers prefer boxed to carcass beef and are willing to pay a higher price for it. This is absolutely correct. But it in no way negates the fact that if oligopoly pricing caused the differential between boxed and carcass prices to increase, retailers, in the aggregate, would purchase more carcasses and less boxed beef. J.A. 596-97; Def. Ex. 7R at 14-15, 17. It is this aggregate effect that would defeat the oligopoly pricing effort, regardless of whether some retailers may find themselves unable to switch their purchases. Second, retailers' ability to handle carcass beef has declined, and they increasingly rely exclusively on boxed beef supply. Yet, as the District Court found, 28 percent of all carcasses continue to be purchased and fabricated by retailers directly (Pet. App. 29a)—a substantial share of the beef market even in today's intensely competitive conditions. Third, retailers who can purchase carcasses and fabricate them themselves would not sell to those who cannot. This is probably true. But once again, it is the aggregate effect that counts. So long as retailers with the ability to fabricate increase their purchases of carcasses, boxed beef demand will decline and oligopoly pricing will be defeated, to the benefit of all. For exactly this reason, courts have recognized that, in market circumstances like those here, "captive capacity" *must* be included in the relevant market. *E.g.*, *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913, 930 (9th Cir. 1975).

3. *Fringe firms*: Perhaps the most important deterrent to oligopoly pricing in the beef industry is the capacity of a multitude of small firms substantially to increase their output in response to any effort by the market leaders to depress fed cattle prices and raise boxed beef prices. Monfort does not seem to deny the critical significance of elasticity of supply on the part of a market's smaller participants. Instead, it argues that the lower courts rightly ignored Excel's arguments concerning such supply elasticity here because Excel did not "identify" such firms or prove that they could, individually, expand their output significantly.

The record demonstrates that the top eight firms in the District Court's markets account for less than 70 percent of output;[12] a large number of small firms account for the remainder (*see* S.J.A. 253-87; J.A. 411). Excel's independent expert on beef plant operations testified that small firms could "double-shift" readily and quickly, at relatively modest cost. J.A. 94. Mr. Monfort himself testified that double-shifting requires little in the way of physical changes J.A. 289-90. Finally, Monfort's economic expert acknowledged that fringe firms could double output; he argued only that it would be uneconomical for them to do so at competitive price levels. J.A. 342.

But the critical question, of course, is what would happen if the industry leaders attempted to depress cattle prices below and raise beef prices above competitive levels. In that event, the evidence cited above clearly indicated that small firm output could and would expand substantially. The courts below recognized the pertinence of "new entry" to the Section 7 question presented in this case. But they altogether failed to recognize the analytical equivalence between very rapid new entry and small firm output

[12] *See* J.A. 68 (input market); J.A. 64, 135 (output market).

expansion. Both function in the same way to limit the industry leaders' ability to exercise market power.[13]

We have been able to deal here with only a few of the more important points on which the District Court failed to apply consistent and economically sound analytical principles to the facts the record presented. Although Section 7's legislative history shows a variety of interrelated concerns, including a concern with the competitive vitality of all firms in the market as well as a concern with oligopoly pricing, the statute condemns only those mergers that genuinely threaten competitive market performance. To serve that statutory purpose, this Court's more recent Section 7 cases have attempted to develop meaningful standards that can be applied consistently and objectively. Where, as here, a lower court decision plainly departs from those standards, it both can and must be reversed.

Respectfully submitted,

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[13] *E.g., Weyerhaeuser Co.*, 3 Trade Reg. Rep. (CCH) § 22,315 at 23,382-83 (FTC September 26, 1985); Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553, 557-61 (1983).

AMICUS CURIAE

BRIEF

No. 85-473 (1)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. AND EXCEL CORPORATION, PETITIONERS

v.

MONFORT OF COLORADO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals failed properly to apply the test for "antitrust injury" established in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), when it concluded that the respondent had standing under Sections 7 and 16 of the Clayton Act, 15 U.S.C. 18 and 26, to seek to enjoin the merger of two of its competitors.

2. Whether the court of appeals' analysis of the likely anticompetitive effects of the merger was legally deficient.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. 18, which prohibits anticompetitive acquisitions. In light of these enforcement responsibilities, the United States has a substantial interest in ensuring that private efforts to supplement public antitrust enforcement with respect to mergers and acquisitions are governed by legal standards that are likely to enhance, rather than to frustrate, the competitive policies underlying the antitrust laws.

STATEMENT

1. Petitioners are Cargill, Inc. (Cargill), a large food products company, and Cargill's wholly owned subsidiary, Excel Corporation (Excel). Pet. App. 26a. In June 1983, Excel agreed to buy the Spencer Beef Division of Land O'Lakes, Inc. (Spencer), an agricultural cooperative that operated three beef-packing

and fabrication facilities. *Id.* at 26a-27a. At the time of the agreement, Excel and Spencer were, respectively, the second and third largest beef packers in the United States. *Id.* at 2a. After the acquisition, Excel would remain the second largest. *Id.* at 19a.

The companies filed the agreement with the Department of Justice and the Federal Trade Commission as required by Section 7A of the Clayton Act, 15 U.S.C. 18a. After investigation, the Antitrust Division of the Department of Justice advised petitioners that it did not intend to challenge the acquisition.[1]

In the meantime, however, respondent Monfort of Colorado, Inc. (Monfort), the nation's fifth largest beef packer (Pet. App. 2a), filed a federal antitrust suit in the District of Colorado, seeking to enjoin the transaction on the ground that it would violate Section 7 of the Clayton Act by lessening competition in the purchase of fed cattle [2] in certain regional markets and in the sale of boxed beef [3] in a nationwide market. Pet. App. 27a.[4]

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[1] The Federal Trade Commission and the Antitrust Division determined, in accordance with their established pre-clearance procedure, that the Antitrust Division would review this acquisition. In a staff letter informing the parties that the government did not intend to challenge the acquisition, the Chief of the Antitrust Division's General Litigation Section stated that "the closing of our investigation should not in any way be construed as a judgment as to the lawfulness of this transaction. Also, you should know that the existence of a private suit challenging the acquisition is a factor in our decision not to take an enforcement action at this time, and that the court's findings could result in a reevaluation of our position in this matter." Letter from Alan L. Marx to 3 James D. Moe, Cargill, Inc. (Oct. 25, 198[illegible]). Although this letter could be read to suggest that the government terminated its investigation in reliance on the ability of a private party to undertake an appropriate enforcement action, it would be contrary to the policy of the Department of Justice to refrain from instituting otherwise appropriate enforcement action simply because private parties have filed suit. As it does in all cases where it states an enforcement intent, the Department reserved the right to take action on the basis of information subsequently coming to its attention.

[2] "Fed cattle" are commercially fattened steers and heifers. They generally yield the highest quality beef. Pet. App. 28a.

[3] "Boxed beef" is beef that has been cut up, vacuum packed, and boxed for shipment. Pet. App. 29a-30a.

[4] See Complaint ¶ 34.

2. At a consolidated preliminary injunction hearing and trial on the merits, Monfort argued that it would be injured because the acquisition would lead to a period of heightened price competition between Excel and the industry leader, IBP, Inc. (IBP), a subsidary of Occidental Petroleum Corporation. Pet. App. 31a. In particular, Monfort contended that Excel and IBP would attempt to increase their respective market shares by engaging in a "price-cost squeeze"—*i.e.*, intentionally bidding up the price of the beef that they buy (fed cattle) while lowering the cost to consumers of the beef that they sell (boxed beef). Pet. App. 31a-32a. Monfort maintained that this "squeeze" would tend to reduce profit margins for all beef packers, thus forcing smaller firms that lack the "vast financial resources" backing Excel and IBP to leave the market. *Id.* at 32a-33a. After achieving increased market shares, Monfort contended, Excel and IBP would then be able to lower prices for fed cattle and raise prices for boxed beef, to the detriment of cattle producers and meat consumers. *Ibid.*

Excel responded that Monfort lacked standing to challenge the proposed sale because any injury it might suffer would result from increased competition and not from any anticompetitive effect. Excel also contested the claim that the acquisition violated Section 7 of the Clayton Act. Pet. App. 33a.

The district court permanently enjoined Excel from acquiring Spencer. Pet. App. 23a-73a. On the antitrust standing issue, the court acknowledged that Monfort did not "contend that predatory practices would be engaged in by Excel or IBP" or that "Excel and IBP would act in collusion with each other in an effort to drive others out of the market." *Id.* at 32a, 71a. Nevertheless, the court found that Monfort had established the requisite standing on the basis of factors considered by this Court in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). The district court observed that "the harm alleged by Monfort has a causal connection to" and "is directly related to" the planned acquisition by Excel, because the injury would occur only if one of the two industry leaders, Excel or IBP, acquired Spencer (Pet. App. 34a). The court also concluded (*id.* at 38a) that the injury to Monfort was "of the type that the antitrust laws were intended to prevent." *Ibid.*

The court found that if the "price-cost squeeze" scenario took place sellers of fed cattle and buyers of boxed beef would have no cause to complain of the acquisition in the short term because the price structure would be favorable for them during this period. The court consequently reasoned that to deny Monfort standing "might leave a significant antitrust violation unremedied." Pet. App. 35a. While the court admitted that "the harm alleged by Monfort might be considered speculative" (*ibid.*), the court nonetheless ruled that Monfort's claim of antitrust injury was sufficient because in cases involving "only injunctive relief, the question of standing becomes less of an issue" and "court[s] may consider more freely other purposes behind giving private litigants an injunctive remedy to prevent or end antitrust violations." *Id.* at 36a.

The court rejected petitioners' argument that, "unless predatory pricing or collusive activity is imminent, there can be no * * * antitrust injury." Pet. App. 38a. But the court found, in any event, that Monfort would be injured through "the distinct possibility" of "predatory pricing" by Excel and IBP in the form of the "cost-price squeeze" postulated by Monfort. *Id.* at 71a.

Finally, the court concluded that the merger violated Section 7 of the Clayton Act. It found that two relevant markets affected by the acquisition, a regional fed cattle input market and a nationwide boxed beef output market (Pet. App. 41a-60a), were highly concentrated and would become significantly more concentrated after the acquisition. *Id.* at 60a-64a.[5] The court also found that the costs and delays associated with the acquisition of new or existing facilities presented significant barriers to entry in these markets. *Id.* at 64a-67a. In addition, the court concluded that the "enormous financial resources available to" Cargill and Occidental Petroleum, IBP's parent, gave "further support to the conclusion that the proposed acquisition would tend to harm competition in both [markets]." *Id.* at 69a.

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[5] In the input market, the court found that the four-firm concentration ratio would increase from 52 to 57.5%, with Excel and IBP having a combined share of 44.8%. Pet. App. 62a. In the output market, the four-firm concentration ratios would increase from 53.8 to 59.5%, with Excel and IBP controlling 47.7%. *Id.* at 63a.

3. The court of appeals affirmed. Pet. App. 1a-22a. It recognized that the antitrust standing necessary to seek the injunction required something more than an allegation that the defendant violated Section 7. The court reasoned, however, that "it is much easier for a plaintiff to show causation of its hypothetical antitrust injury by a putative antitrust violation" in a Section 16 injunction case than in a damage action. Pet. App. 4a. The court of appeals concluded that, in the case of Section 16, 15 U.S.C. 26, this Court's holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), "mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation." Pet. App. 5a.

Turning to Monfort's specific claims of injury, the court of appeals acknowledged that Monfort "would surely benefit if beef prices rose following Excel's acquisition. " Pet. App. 7a. But since Monfort alleged that the acquisition would result in "what we consider to be a form of predatory pricing," *i.e.*, the "price-cost squeeze," Monfort's claims of injury were "directly tied to the putative Clayton Act section 7 violation." *Id.* at 7a-8a. The court also acknowledged that, because the alleged predation was "only threatened," the court "lack[ed] the ordinary guideposts such as marginal cost and average variable cost that might otherwise highlight a [predatory pricing] violation," and that it was "impossible to tell" whether Monfort would in fact be injured by the alleged Section 7 violation. Pet. App. 9a. The court of appeals concluded, however, that Monfort had "alleged a plausible theory for how it may be injured" by the acquisition (*ibid.*) and that even though Monfort "will only suffer antitrust injury if Excel abuses its market power, the causal connection will exist if the ultimate injury materializes." *Id.* at 13a. Accordingly, the court held that Monfort had standing to seek to block the acquisition.

The court also affirmed the district court's holding that the acquisition violated Section 7. It concluded that the district court's findings on market definition and entry barriers were not clearly erroneous (Pet. App. 15a-17a) and rejected claims of legal error in the district court's analysis (*id.* at 17a-20a).

DISCUSSION

This case presents an issue of substantial and growing public importance, *i.e.*, whether competitors will be able to use Section 7 of the Clayton Act as a weapon to thwart mergers and acquisitions that may enhance competition and thus benefit consumers and the economy at large. Increasingly, less efficient firms that would suffer from such competition are turning to antitrust complaints to block efficient, and thus procompetitive, mergers. The standing requirement should work as a barrier to such misuse of antitrust allegations, but in this case the court of appeals applied a permissive standing test that will provide little protection and is inconsistent with the requirements established by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, and *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra*. The court of appeals' holding on the standing issue warrants this Court's review, both because of the importance of the issue and because most cases presenting this question are rendered moot long before full appellate review can be completed, since contracts generally provide that the mere pendency of an antitrust complaint is a basis on which to withdraw from an acquisition proposal.

By contrast, we do not urge that the Court review the lower courts' holding that a violation of Section 7 was properly established. While the court's analysis was flawed, its errors in this regard are of far less public importance than the question of standing, which in our view should be dispositive in this case.

1. a. A plaintiff has standing to contest an alleged antitrust violation only if two conditions are met. First, the plaintiff must have suffered actual or threatened injury as a result of the alleged violation. This requirement is rooted in the "case or controversy" clause of Article III of the Constitution and precludes a claim of standing based solely on injury to others or to the public. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

The second requirement is that the plaintiff must have suffered what this Court has termed "antitrust injury." *Brunswick Corp.*, 429 U.S. at 489. This requirement was most clearly explained in *Brunswick Corp.*, where several bowling centers

challenged the acquisition of competitors, claiming that they had been injured by the acquisitions because otherwise their competitors would have gone out of business. 429 U.S. at 481. Holding that the plaintiffs lacked standing, this Court emphasized that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*'" and observed that the plaintiffs' complaint—in essence, that they had been deprived of the benefits of decreased competition—was "inimical to the purposes" of the antitrust laws (*id.* at 488 (emphasis in original)). The Court stressed (*id.* at 489 (emphasis in original)) that antitrust plaintiffs must "prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

Brunswick involved standing to seek damages under Section 4 of the Clayton Act, 15 U.S.C. 15, rather than injunctive relief under Section 16, and it is true that the requirements for standing in an equitable action are in some respects less stringent than in a suit for damages.[6] Under Section 4, injury to the plaintiff must have actually occurred, whereas under Section 16 it need only be threatened. Nevertheless, Section 16, no less than Section 4, requires a showing of antitrust injury.[7] *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211

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[6] See *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211 (3d Cir. 1980). Equitable actions do not present the problems of multiple recoveries or of calculating damages. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-262 (1972); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 590-594 (3d Cir. 1979). And whereas a plaintiff in a Section 4 suit for damages must have suffered actual injury to business or property under Section 16 a "significant threat" of injury is sufficient. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

[7] In *Brunswick Corp.* and *Associated General Contractors*, the Court did not specifically address the question of Section 16 standing. In *Brunswick Corp.*, 429 U.S. at 491, the petitioner had not contested respondents' standing to seek an injunction, and in *Associated General Contractors*, 459 U.S. at 524 n.5, the issue was not considered because plaintiffs had not sought injunctive relief.

(3d Cir. 1980); *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); Easterbrook & Fischel, *Antitrust Suits By Targets Of Tender Offers*, 80 Mich. L. Rev. 1155, 1165-1166 & n.27 (1982); cf. *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354, 1357 (6th Cir. 1985). The antitrust laws would be perverted if they could be used to thwart transactions that would enhance competition; a suit for injunctive relief, as well as a suit for damages, must "serve * * * the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969); see also *Schoenkopf*, 637 F.2d at 210-211; *Merit Motors, Inc.* v *Chrysler Corp.*, 569 F.2d 666, 670 n.14 (D.C. Cir. 1977); 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 328a (1978).

b. The question of competitor standing to challenge a merger under Section 7 must be addressed in light of the economic reality that competitors generally have a strong incentive to bring such a suit in precisely the wrong cases. If a merger seems likely to result in a new rival that is more efficient and thus able to sell its products at lower prices, the competitors of the new firm will be particularly anxious to thwart its creation, although the threat to competitors will not constitute "antitrust injury." See Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985).[8] By contrast, if a merger seems likely to change the market structure in such a way as to enable the remaining firms to restrict output and raise prices, competitors will stand to benefit and will have little incentive to challenge the merger. *Ibid.* It is, however, precisely these mergers that Section 7 proscribes. See 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 910b (1980). It is, accordingly, incumbent on courts to scrutinize the question of standing with particular care when a competitor challenges a merger and to demand strict compliance with the requirement that actual or threatened "antitrust injury" be properly alleged and shown.[9]

[8] See also *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 859-860 & n.12 (2d Cir.), cert. denied, 419 U.S. 883 (1974); L Sullivan, *Handbook of the Law of Antitrust* 614-615 (1977); 4 P. Areeda & D. Turner, *supra*, ¶ 901.

[9] In Section 7A of the Clayton Act, 15 U.S.C. 18a (the Hart-Scott-Rodino Antitrust Improvements Act of 1976), Congress has given the Department of

c. In the present case, respondents attempted to satisfy the standing requirement on the basis of allegations that petitioners might engage in predatory pricing if the acquisition were allowed. In our view, there is cause for particular skepticism when a competitor asserts this basis for standing. A competitor may tend to view any pricing with which it cannot compete as "predatory," and the problem of differentiating between lawful price cuts—which are evidence of competition at work—and truly predatory pricing presents considerable theoretical and practical difficulties.[10] Accordingly, a claimed fear of predatory pricing can be used by a competitor as a ruse for preventing lawful price competition—even though the fundamental purpose of the antitrust laws is to encourage such competitive behavior. The antitrust laws do not condemn vigorous price competition, even if it promises to increase a seller's market

Justice and the Federal Trade Commission broad powers to conduct a comprehensive review of proposed mergers and acquisitions prior to their consummation. These procedures unavoidably create some delay. Recognizing that undue delay may jeopardize socially beneficial transactions, Congress imposed strict deadlines on the government agencies (15 U.S.C. 18a(b) and (e)(2)), provided for maximum judicial expedition in the event the government elects to file suit (15 U.S.C. 18a(f)), and established an "early release" procedure for transactions determined by the government agencies not to impose any risk of anticompetitive effects (15 U.S.C. 18a(b)(2)). While the Hart-Scott-Rodino review process does not immunize the merging firms from private antitrust liability (see 15 U.S.C. 18a(i)(1)), allowing private competitors routinely to file suit to block transactions cleared by the Antitrust Division or the Commission creates a tension with Section 7A. The resolution of this tension between public and private antitrust enforcement requires that the courts be sensitive both to the congressional purpose to permit procompetitive or competitively neutral transactions to proceed without undue delay and to the possibility that a competitor may have a strong incentive to use antitrust allegations to block or delay a proposed merger precisely because the transaction promises to enhance competition.

[10] *Southern Pacific Communications Co.* v. *AT&T*, 740 F.2d 980, 1003 & n.27 (D.C. Cir. 1984), cert. denied, No. 84-1080 (Feb. 25, 1985); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); R. Posner & F. Easterbrook, *Antitrust Cases, Economic Notes, and Other Materials* 680, 683 (2d ed. 1981); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711a (1978).

share at the expense of its rivals.[11] Thus, if unsupported or speculative claims of predatory pricing are upheld, the result may well "chill the very behavior the antitrust laws seek to promote." *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).[12]

Here, of course, there is no claim of actual predation, against which the Sherman Act would afford respondent appropriate protection, but only a claim that its rivals' proposed merger threatens the possibility of future predation. The threat of predation, we submit, should not be accepted as the basis for a claim of antitrust injury when there is no proof that the merger will so change market structure as to make predation an economically credible possibility.[13] Predatory pricing has no chance of eliminating competition unless, at a bare minimum, the firm in question has a very substantial share of the market

[11] 3 P. Areeda & D. Turner, *supra*, ¶ 711a; *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 927 (1st Cir. 1984), cert. denied, No. 84-1353 (Apr. 15, 1985); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

[12] Accord, *Bayou Bottling, Inc.* v. *Dr Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1984), cert. denied, No. 83-2088 (Oct. 1, 1984); see Miller & Pautler, *Predation: The Changing View In Economics And The Law*, 28 J.L. & Econ. 495 (1985). Thus, "[u]nhappy rivals may automatically assume predation when a competitor's price is below their costs, disregarding the possibility that the alleged predator's cost is well below theirs and more than covered by his price." 3 P. Areeda & D. Turner, *supra*, ¶ 711a, at 151. Others have commented similarly that "allegations of predatory pricing should be understood as attempts by inefficient firms to obtain protection from their lower-cost (and hence lower-price) rivals." R. Posner & F. Easterbrook, *supra*, at 682.

[13] In cases alleging actual predatory prices, courts have tended to focus on an assessment of prices and costs. Unless a price is below cost it ought not lead generally to the inference that a price is "predatory." See *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1055-1056 (6th Cir. 1984), cert. denied, No. 84-493 (Nov. 26, 1984); *Sunshine Books, Ltd.* v. *Temple University*, 697 F.2d 90, 92 (3d Cir. 1982); *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 131 (2d Cir.), cert. denied, 454 U.S. 968 (1981); *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888-891 (5th Cir. 1984), cert. denied, No. 84-793 (Jan. 14, 1985); see also *Brunswick Corp.*, 429 U.S. at 489 n.14 (emphasis added) (referring to "predatory *below-cost* pricing").

and barriers to entry are high.[14] If the firm does not have the capacity for supplying all or almost all of the demand at the predatory prices, then it will not be capable of destroying competition in the short run. In addition, the firm, no matter what its capacity, will be unable to destroy competition in the longer term unless barriers to entry are so high that new firms cannot profitably enter and firms driven out of the market by low prices cannot profitably reenter when the predator seeks to raise prices above the level that would prevail in a competitive market. See 3 P. Areeda & D. Turner, *supra*, ¶ 711b.[15] Thus, before a court makes a threshold determination of standing based on a claim of threatened predation, the plaintiff should be required to establish, at a minimum, that after the merger the new firm will have a dominant market share that at least creates a dangerous probability that unilateral predation by that firm will be successful. Without even this minimal showing, any fear of predation is simply fanciful, and the statutory "antitrust injury" requirement of Section 16 therefore cannot be met. While such a generalized complaint by a competitor appears superficially to allege a form of antitrust injury, its wholly conclusory and unrealistic reference to the possibility of predation fails to differentiate it in substance from the attempt to interfere with

[14] See 3 P. Areeda & D. Turner, *supra*, ¶ 711b; *American Trucking Ass'n, Inc.* v. *United States*, 755 F.2d 1292, 1299 & n.5 (7th Cir. 1985). See also *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d at 130 ("because the social costs of failing to distinguish between predatory pricing and competitive pricing are frequently high," sound analysis permits examination of a defendant's pricing behavior only after evidence of monopoly power is shown). Thus, claims of predatory pricing most frequently arise in cases brought to challenge monopolistic behavior, usually under Section 2 of the Sherman Act, 15 U.S.C. 2. *E.g.*, *United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945); *Kartell* v. *Blue Shield, Inc.*, 749 F.2d at 927; *Western Concrete Structures Co.* v. *Mitsui & Co.*, 760 F.2d 1013, 1018 (9th Cir. 1985); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d at 1054-1055; *Quality Foods* v. *Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 997 (11th Cir. 1983).

[15] It is not the harm to competitors from predatory pricing that itself raises antitrust concerns. Rather, predation is proscribed because of the danger that the predator will use the monopoly that results when competitors are driven from the market to restrict output and raise prices to consumers.

competitive activity that this Court rejected in *Brunswick*, and so should not suffice to meet the threshold requirement of standing.

Even if these conditions are met and a merged firm is *capable* of engaging in predatory pricing, it is unlikely to find such a strategy profitable. The cost of driving out competitors through predation is likely to be high and must be borne by the predatory firm. In order to make this strategy profitable, the discounted value of the profits expected once competitors are driven out must exceed the actual short-term costs. In addition, because predatory pricing is easily detected, a firm pursuing such a strategy runs a substantial risk of a private treble damage suit. Thus, it is not surprising that actual incidents of predatory pricing since the passage of the Sherman Act have been exceedingly rare.[16] For all these reasons, an allegation that the possibility of predatory pricing will be facilitated is a highly suspect ground on which to base a finding of antitrust injury sufficient to support standing by a competitor.

d. Judged by the standards outlined above, the court of appeals' analysis of the standing issue in this case was plainly deficient. In this case, respondent Monfort did not even allege that petitioners would engage in predatory pricing as a result of the acquisition – or indeed that any specific "antitrust injury" would befall it (Pet. App. 32a, 71a).[17] Nonetheless, the court of appeals concluded that respondent's allegations were sufficient to establish standing (*id.* at 7a).

[16] Compare the relatively small incidence (and even smaller success) of predation cases (see Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105, 111-112 (1971); Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 Vand. L. Rev. 63, 140-143 & nn. 294-295, 156-157 (1982); Miller, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985)) with the substantially greater number of cases raising and successfully proving collusion (see Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 398, 408-409 (1970); U.S. Dep't of Justice, *Annual Report of the Attorney General of the United States* 115-116 (1983)).

[17] The complaint in this case alleged that the acquistion would violate Section 7 in the following ways: it would increase concentration in the markets for fed cattle and boxed beef; Excel would use its increased market power "to impair competition"; the acquisition would raise entry barriers in the beef industry generally; and the "result[ing] * * * concentration of economic power in the relevant markets" would threaten Monfort's supply of fed cattle and its ability to compete in the boxed beef market. Complaint ¶ 34(a)-(f). The complaint did not specify how Monfort's ability to compete would be harmed, beyond the assertion that "[i]f Excel and Spencer Beef are allowed to merge, the resulting company, along with IBP, would dominate the market for the procurement of fed cattle and severely impair Monfort's ability to obtain fed cattle and compete in the boxed beef market." Complaint ¶ 23. The only additional claim of injury to Monfort was in the "public interest" section of the complaint, where Monfort simply claimed that "[t]he elimination of Spencer Beef as a direct competitor will cause injury to Monfort and the general public * * *." *Id.* ¶ 36(f).

The court of appeals made no attempt to determine whether the post-acquisition structure of the market would be conducive to a predatory strategy.[18] Had it done so, it would have been forced to conclude that no "significant" threat of predation would be created by the acquisition. In view of the district court's findings that Excel's post-acquisition share of the market would be less than 21% (Pet. App. 13a) and that after the merger IBP would remain the largest firm in the market, there was no basis for a conclusion that Excel would be able to engage in predation, much less that it would have an incentive to try. Thus the threshold inquiry should have been resolved against respondent.

Moreover, even if Excel could and did engage in predatory pricing, the court of appeals recognized that "[w]hether Monfort would suffer any injury * * * depends on how long" this continued. Pet. App. 9a. If the period of predatory pricing lasted only briefly, Monfort would survive and ultimately benefit from the resulting lessened competition and increased prices. *Ibid.* Only if the period of predatory pricing were sustained and Monfort were driven out of business as a result would Monfort and competition suffer. *Ibid.* The court acknowledged that "[i]t is impossible to tell in advance of the acquistion which situation would occur, *if either.*" *Ibid.* (emphasis added). Clearly, such speculation is not sufficient to establish

[18] The court of appeals recognized that it could not attempt to assess the price-cost squeeze in traditional terms of Excel's "costs" "because the predation in this case is only threatened," and the court "lack[ed] the ordinary guideposts such as marginal cost and average variable cost that might otherwise highlight a violation." Pet. App. 9a.

the "significant" threat of injury to Monfort necessary to accord it standing.[19]

e. The decision below adds significantly to the risk that competitors will use antitrust allegations for anticompetitive purposes. Under the lax standard applied by the court of appeals, a competitor, simply by alleging that predation might result, could have standing to challenge virtually any substantial acquisition. Indeed, such suits, once a rarity, are becoming increasingly and alarmingly common.[20]

In light of the strong incentive of any rational firm to block or delay a competitor's acquisition that would intensify competition, the danger that antitrust suits may be brought for anticompetitive purposes is very serious. As a practical matter, even the threat of litigation can stall or deter a merger that would foster competition.[21] The ability of a competitor to tie up a merger in court raises the cost of the merger, including both litigation costs and the adverse effects that uncertainty about the future of the acquired firm has on employees, customers, suppliers, and others. A long delay can be enough to cause the parties to drop their merger plans. Thus, the harm to competition will often be done before any court has the opportunity to

[19] The court also posed the possibility that Excel could, through its acquired market power, become a price leader (charging supracompetitive prices for boxed beef and inducing Monfort and smaller competitors to follow its lead). Pet. App. 7a-8a. The court recognized, however, that while such "price leadership" might result in higher prices that would harm "competition," that would benefit Monfort by enabling it to reap higher profits. *Ibid.*

[20] In the last two years, there have been, in addition to this case, at least five actions brought to enjoin competitors' acquisitions. *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), cert. dismissed, No. 84-1220 (Feb. 26, 1985); *Chrysler Corp.* v. *General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984); *White Consol. Indus., Inc.* v. *Whirlpool Corp.*, 1985-2 Trade Cas. (CCH) ¶ 66,699 (N.D. Ohio); *Pennzoil Co.* v. *Texaco, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,896 (10th Cir.).

[21] "Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors * * * intimida[ting a potential defendant] into the sort of gentlemanly competitive behavior that is the antithesis of true competition." Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985); accord, Miller, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985).

rule on the merits of the case. And even if a district court has the opportunity to rule, the speed with which the merger market operates will seldom allow for an appeal,[22] much less review by this Court.[23]

Typically, the parties to a merger agree that in the case of antitrust difficulties they may avoid their contractual obligations to complete the merger. This case is unusual in that the parties failed to include such a provision in their agreement. Here, Excel has to pay the contract price even if the courts enjoin it from acquiring and operating Spencer, and it is apparently for this reason that Excel has continued litigating the case.[24] Because of these unique circumstances, this case presents what is likely to be a rare opportunity for this Court to address the issue of a competitor's standing to seek to enjoin a merger. Leaving the court of appeals' decision in this case undisturbed would increase substantially the likelihood that filing an antitrust suit will become a routine tactic whenever a firm fears that an acquistion will permit its rival to achieve efficiencies that will lead to more vigorous competition—a result "inimical to the purposes" of the antitrust laws.

2. Although we believe that the lower courts' analysis of the merits of respondent's case was seriously flawed, we do not urge the Court to review this question.

a. Given our contention that respondent has not made out a sufficient threat of predatory pricing even to cross the threshold

[22] The dynamic economic context in which corporate acquisitions occur frequently leads a prospective purchaser immediately to withdraw its purchase offer if a district court grants a preliminary injunction. Schneiderman, *Preliminary Relief In Clayton Act Section 7 Cases*, 42 Antitrust L.J. 587, 588-590 (1973); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir.), cert. denied, 419 U.S. 883 (1974); Pet. 15 & n.12.

[23] *E.g.*, *G. Heileman Brewing Company, Inc.* v. *Christian Schmidt Brewing Co.*, cert. dismissed, No. 84-1220 (Feb. 26, 1985).

[24] The entry of a preliminary injunction or even the credible threat of a lawsuit may be enough for the parties to invoke the usual antitrust provision in their contract. This case is virtually certain to be unique in that Excel agreed unconditionally to pay $60 million for the Spencer plants. It is our understanding that Land O' Lakes sold the Spencer plants to E.L. Miller and Sons after the court of appeals affirmed the district court's injunction against the petitioners' acquiring them but that petitioners retain a contingent interest in those assets.

of standing, it follows *a fortiori* that its allegations cannot suffice to establish the substance of an antitrust violation. In analyzing this issue, the courts below relied almost exclusively on changes in market concentration that are usually examined to evaluate the effect of a merger on the likelihood of oligopoly pricing. Changes in market concentration of the sort relied on by the lower courts, however, provide no indication whatever of the merger's effect on the likelihood of predation (which was the supposed basis of respondent's standing). On the contrary, the most relevant factor, Excel's market share, which was only about 20%, conclusively shows that after the merger Excel would not have the power successfully to engage in predatory practices—and therefore, as we have argued, should have sufficed to eliminate Monfort's complaint on standing grounds.

This conclusion is not altered by the absolute size or "deep pockets" of Excel's parent, Cargill. If the structure of the market makes it impossible for Excel successfully to pursue a strategy of predatory pricing, "deep pockets" cannot change that economic reality.[25] Cargill would simply have more money to lose than smaller firms if it engaged in below-cost pricing that was doomed to fail.[26] Moreover, the fact that internal documents indicate that Excel wanted to grow in market share at the expense of its other competitors (see Pet. App. 70a-71a) is hardly evidence that the merger would have an adverse effect on competition. Indeed, such growth in a firm's output through vigorous competition is precisely the sort of conduct the antitrust laws should foster.

b. Moreover, the lower courts' analysis of the merger's threat of oligopoly pricing was itself seriously flawed. The changes in market concentration brought about by a merger provide an important starting point for merger analysis, but merger analysis must allow for consideration of other relevant factors that affect the likelihood that oligopoly pricing will occur. See *United*

[25] Indeed, Excel, with its "deep pocket" parent, was in this market before the merger, and there is no claim that it had engaged in predation.

[26] See R. Bork, *The Antitrust Paradox* 251 (1978) ("the law certainly cannot sensibly apply a presumption that the mere possession of capital will probably lead to * * * predation").

States v. *General Dynamics Corp.*, 415 U.S. 486 (1974). Although both lower courts recognized the relevance of factors other than market share statistics in judging the lawfulness of the merger, the court of appeals appeared unwilling meaningfully to examine economically relevant factors beyond those statistics. Pet. App. 18a-19a.[27]

In addition, the lower courts' analysis of entry barriers is seriously defective. The district court found that it would cost $?0 to $40 million and take 12 to 18 months to construct new slaughter and fabrication facilities with a minimally viable capacity. Pet. App. 65a.[28] The court concluded that these costs and delays constituted "formidable barriers to new entrants" when "combined with the previously discussed low profit margins in the beef industry." *Ibid.* The court of appeals endorsed this analysis, holding that the district court's factual findings were not clearly erroneous (*id.* at 15a-17a).

This analysis is flawed, in our judgment, first, because both courts below erroneously focused solely on current profit margins in analyzing whether a firm would find it profitable to enter the market after petitioners had driven out competitors and had begun to reap supracompetitive profits by paying less for fed cattle and charging more for boxed beef. At this point, a new firm entering the market (or an old firm reentering) could expect to obtain similar profits, and thus the more relevant figure is the supra-competitive profit margin. Accordingly, the lower courts should have considered the probability of entry in response to a small but significant, non-transitory increase in price.[29]

[27] Even in cases involving highly concentrated markets, the Department of Justice does not challenge a merger without considering other relevant factors. Antitrust Division, *U.S. Department of Justice Merger Guidelines*, § 3.11(c) (June 14, 1984) [hereinafter cited as *Justice Department Merger Guidelines]*.

[28] The court found that it also would be difficult to find and costly to acquire and refurbish existing facilities to run at a minimally viable capacity. Pet. App. 66a.

[29] The *Justice Department's Merger Guidelines* §§ 2.11, 3.3, posit a 5% increase lasting two years as a general rule, although smaller percentage increases might be appropriate in markets such as this, where profit margins have historically been low.

The courts below also erred in regarding entry costs of $20 to $40 million and a time frame of a year and a half as constituting significant barriers to new entry. Absolute cost figures alone have little meaning (2 P. Areeda & D. Turner, *supra*, ¶ 409e [10]), and the time frame posited does not constitute a significant barrier to entry.[11]

While we believe that the lower courts' analysis of the merits of this case is flawed, we do not urge that the Court grant review with respect to that question. The general standards for making out a violation of Section 7 have been established by this Court. Review of that aspect of the decision in this case is not needed, in our judgment, to provide further guidance for the lower courts. The question of standing is of great public importance, however, and should be dispositive of this case.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented in the petition.

Respectfully submitted.

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[10] It is the risk involved, the unrecoverable costs if the venture fails, and the probability of such failure occurring that are relevant.

[11] See *Justice Department Merger Guidelines* § 3.3 (positing a two-year period for entry).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 85-473

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. AND EXCEL CORPORATION, PETITIONERS

v.

MONFORT OF COLORADO, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the test for "antitrust injury" established in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), when it concluded that the respondent had standing under Sections 7 and 16 of the Clayton Act, 15 U.S.C. 18 and 26, to seek to enjoin an acquisition by one of its competitors.

2. Whether the court of appeals properly analyzed the likely anticompetitive effects of the acquisition.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. 18, which prohibits anticompetitive acquisitions. In light of these enforcement responsibilities, the United States has a substantial interest in ensuring that private efforts to supplement public antitrust enforcement with respect to mergers and acquisitions are governed by legal standards that are likely to enhance, rather than to frustrate, the competitive policies underlying the antitrust laws.

STATEMENT

1. Petitioners are Cargill, Inc. (Cargill), a large food products company, and Cargill's wholly owned subsidiary Excel Corporation (Excel) (Pet. App. 26a). In June 1983, Excel agreed to buy the Spencer Beef Division of Land O'Lakes, Inc. (Spencer), an agricultural cooperative that owned three beef-packing and fabrication facilities

(*id.* at 26a-27a). At the time of the agreement, Excel was the second largest integrated beef packer and fabricator in the United States while, in terms of total productive capacity, Spencer was the third largest producer (*id.* at 2a).[1] Excel's acquisition of Spencer's productive capacity would have left it the second largest integrated producer in the market found by the district court. Excel and Spencer notified the government of the proposed acquisition pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a. The Antitrust Division of the Department of Justice opened an investigation.

While that investigation was pending, respondent Monfort of Colorado, Inc. (Monfort),[2] another large beef packer, filed a federal antitrust suit in the United States District Court for the District of Colorado seeking to enjoin the acquisition on the ground that it would violate Section 7 of the Clayton Act by lessening competition in the purchase of fed cattle[3] in certain regional markets and in the sale of boxed beef nationwide (Pet. App. 27a).[4] The complaint alleged that the increased concentration in

[1] One of Spencer's plants, located in Schuyler, Nebraska, approximately 60 miles from one of respondent's plants, accounted for approximately half of Spencer's capacity (Tr. 160). Spencer apparently found it unprofitable to operate this plant because of high labor costs and had closed it in December of 1982 (*id.* at 147). At the time of the proposed acquisition, Monfort's output was roughly equal to Spencer's (*id.* at 129-130).

[2] At the time Monfort filed suit, it produced approximately 6-7% of all boxed beef sold nationwide (Tr. 160). In terms of output, Monfort, Spencer, and another boxed beef producer, SIPCO, were all approximately tied for the rank of third largest firm in the industry (*id.* at 129).

[3] "Fed cattle" are steers and heifers that are fattened in commercial feedlots for 100 to 140 days prior to slaughter (Tr. 40-41). Fed cattle generally yield a higher quality of beef than cows or bulls (*id.* at 86) or "non-fed" cattle, *i.e.*, cattle that are not fattened on feedlots.

[4] "Boxed beef" is beef that has been cut, vacuum packed, and boxed for shipment (Pet. App. 29a-30a). B. Marion, *The Organization and Performance of the U.S. Food System* 127 (1986). It accounted for approximately 60% of all beef sold in 1982 (*ibid.*).

these markets would impair Monfort's ability to purchase fed cattle and to compete with Excel and the industry leader, IBP, Inc. (IBP), a subsidiary of Occidental Petroleum Corporation (*ibid.*).[5] Thereafter, the Department of Justice closed its investigation and advised the petitioners that it did not intend to challenge the acquisition.[6]

2. a. At a consolidated preliminary injunction hearing and trial on the merits in the private action, Monfort argued that it could be injured because the acquisition would lead to a period of heightened price competition between Excel and IBP (Pet. App. 31a). Specifically, Monfort contended that aggressive competition between Excel and IBP in the boxed beef market would subject Monfort and other producers to a "price-cost squeeze" as the price of boxed beef decreased and the cost of fed-cattle increased. Monfort maintained that this "squeeze" would tend to reduce profit margins for all beef packers and that smaller firms lacking the "vast financial resources" of Excel and IBP would be driven from the market. *Id.* at 32a-33a. Monfort did not allege in its complaint, or argue at trial, that this "price-cost squeeze" would occur as a result of collusion between Excel and IBP.[7] In fact,

[5] See Complaint ¶ 34.

[6] In a letter informing counsel that it did not intend to challenge the acquisition, the Antitrust Division noted that the pendency of the private suit was a factor in its decision "not to take an enforcement action at this time." Letter from Alan L. Marx to James D. Moe, Cargill, Inc. (Oct. 25, 1983). As in all cases where it states a present intention not to take enforcement action, the Department reserved the right to take action based on information that might subsequently come to its attention, whether from the private suit or elsewhere. It would be contrary to the policy of the Department of Justice to refrain from instituting an appropriate enforcement action simply because a private party had filed suit.

[7] Indeed, Kenneth Monfort, Monfort's president and principal witness, testified that Monfort's injury, if any, would be caused by IBP's and Excel's efforts to increase their market share, efforts that he conceded need "[n]ot [be] collusive" (Tr. 118-119). He testified that in vying for market share, Excel and IBP would

Monfort acknowledged that the boxed beef industry was very competitive and that a "price-cost squeeze" had "existed throughout the industry for the last 20 years" (Tr. 132).[8] Monfort, however, contended that, after Excel and IBP had increased their market shares, the prices charged customers for boxed beef would rise, while the prices paid for fed cattle would fall (Pet. App. 32a-33a). Monfort did not claim that this would occur as a result of predatory practices by, or collusion between, IBP and Excel.[9]

Excel responded that Monfort lacked standing because the only injury it could suffer as a result of the acquisition—being driven from the market as a result of an accentuated "price-cost squeeze"—was, on Monfort's own allegation, injury that would flow from increased competition between IBP and Excel. Excel also contested Monfort's claim that the acquisition violated Section 7 of the Clayton Act (Pet. App. 33a).

b. The district court permanently enjoined Excel from acquiring Spencer (Pet. App. 23a-73a). In finding that Monfort had standing to challenge the acquisition, the district court considered it irrelevant that Monfort did not "contend that predatory practices would be engaged in by Excel or IBP * * [or] assert that Excel and IBP would act in collusion with each other in an effort to drive oth-

"simply increase their production by working Saturdays, by being very aggressive in the marketplace, and the happening occurs without them ever talking to each other" (*id.* at 120).

[8] Although Mr. Monfort testified that he had "severe question[s] whether in this kind of scenario * * * Monfort * * * could compete with Excel/Spencer * * * or IBP" (Tr. 115), and that he believed that the acquisition "would adversely affect [Monfort's] margins, perhaps to such a degree that we would be forced out of business" (*id.* at 122), he conceded that the "price-cost squeeze" was a function of the competitive nature of the beef industry, and that Monfort had since its creation been successful in its efforts to compete (*id.* at 133-134).

[9] Mr. Monfort testified that he thought it was "very unlikely" that IBP and Excel would collude to depress the price they paid for fed cattle; he stated that "I do not feel that they would collude with each other" (Tr. 130).

ers out of the market" (*id.* at 32a, 71a). The court found that Monfort had satisfied the tests for standing this Court set forth in *Associated General Contractors of California, Inc.* v. *California State Council*, 459 U.S. 519 (1983), because "the harm alleged by Monfort has a causal connection" and "is directly related to" the planned acquisition by Excel. The district court reasoned that the injury Monfort alleged would occur only if one of the two industry leaders, Excel or IBP, acquired Spencer (Pet. App. 34a) and concluded that the injury to Monfort was "of the type that the antitrust laws were intended to prevent" (*id.* at 38a).

In concluding that Monfort had standing, the court noted that, at least in the short-term, neither buyers of boxed beef nor sellers of fed cattle would have any incentive to challenge the acquisition because a "price-cost squeeze" would be to their advantage. The court said that denying Monfort standing "might leave a significant antitrust violation unremedied." Pet. App. 35a. Moreover, although the court stated that the "harm alleged by Monfort might be considered speculative" (*ibid.*), it held that in cases involving "only injunctive relief, the question of standing becomes less of an issue" and "court[s] may consider more freely other purposes behind giving private litigants an injunctive remedy to prevent or end antitrust violations" (*id.* at 36a). Finally, notwithstanding the fact that Monfort did "not allege that IBP and Excel will in fact engage in predatory activities" (*id.* at 71a), the court held that the acquisition would "make such practices a distinct possibility" and that Monfort was therefore "realistically threatened with a significant injury personal to itself" (*ibid.*).

Turning to the merits, the court concluded that the merger violated Section 7 of the Clayton Act. It found that two relevant markets affected by the acquisition, a regional "fed cattle" input market, and a nationwide "boxed beef" output market (Pet. App. 41a-60a), were both highly concentrated and that concentration would

increase as a result of the acquisition. *Id.* at 60a-64a.[10] The court also found (*id.* at 64a-67a) that there were capital, temporal, and "psychological" difficulties associated with the acquisition of new or existing facilities that, taken together, amounted to "significant entry barriers" facing any "potential entrants" (*id.* at 64a).[11] In addition, the court concluded that the fact that "enormous financial resources [are] available to" Cargill and Occidental Petroleum, IBP's parent, "lends further support to the conclusion that the proposed acquisition would tend to harm competition in both" markets. *Id.* at 69a.

3. The court of appeals affirmed (Pet. App. 1a-22a). The court recognized that for Monfort to have standing to seek an injunction under Section 16, 15 U.S.C. 26, it was required to allege more than that the acquisition would violate Section 7. The court agreed with the district court, however, that "it is much easier for a plaintiff to show causation of its hypothetical antitrust injury

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[10] In the input market, the court found that the four-firm concentration ratio would increase from 52% to 57.5%, with the top two firms, IBP and Excel, having a combined share of 44.8% (Pet. App. 62a). In the output market, the court found that the four-firm concentration ratio would increase from 53.8% to 59.5%, with IBP and Excel controlling 47.7% (*id.* at 63a).

[11] The estimates offered at trial as to the cost of constructing a new facility ranged from $20 to $40 million (Pet. App. 65a). The district court made no explicit finding as to which estimate was correct but instead simply held that the "large capital costs needed for entry" amounted to "formidable barriers to new entrants" (*ibid.*).

The court also discounted the fact that a new competitor had entered the market as recently as 1981. Although Mr. Monfort himself testified that this recent entrant—Val-Agri—was an example of significant recent entry (Tr. 110) and that Val-Agri was currently a competitor of Monfort's and would "be a better one" in the future (*id.* at 126), the district court held that because Val-Agri "has yet to commence full operations * * * it is difficult to assess its impact" (Pet. App. 67a). The court also noted that Val-Agri had acquired an existing facility, and observed that the evidence indicated that there were very few remaining facilities suitable for acquisition (*ibid.*).

by a putative antitrust violation" in a Section 16 injunction case than to show actual injury in a damage action. Pet. App. 4a. It concluded that in a suit seeking injunctive relief this Court's holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), "mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation." Pet. App. 5a.

The court of appeals acknowledged that if, as Monfort claimed, the acquisition ultimately led to higher beef prices and lower cattle prices, Monfort "would surely benefit" (Pet. App. 7a). Turning to Monfort's specific claim of injury, *i.e.*, that the "price-cost squeeze" facing the industry would be intensified for a time immediately after the acquisition, the court reasoned that because a "price-cost squeeze" was "what we consider to be a form of predatory pricing," Monfort's claim of injury was "directly tied to the putative Clayton Act section 7 violation" (*id.* at 7a-8a). The court acknowledged that because any such predatory pricing was "only threatened," "[w]e lack the ordinary guideposts such as marginal cost and average variable cost that might otherwise highlight a [predatory pricing] violation," and that it was "impossible to tell" whether Monfort would in fact be injured by the alleged Section 7 violation (Pet. App. 9a). It concluded, however, that Monfort had "alleged a plausible theory for how it may be injured" by the acquisition (*ibid.*), and that, even though Monfort "will only suffer antitrust injury if Excel abuses its market power, the causal connection will exist if the ultimate injury materializes" (*id.* at 13a). Accordingly, the court held that Monfort had standing to seek to block the acquisition.

The court also affirmed the district court's holding that the acquisition violated Section 7. The court stated that the record did not warrant the conclusion that the district court's definitions of relevant markets were clearly erroneous. Pet. App. 15a. The court of appeals rejected as "speculative" petitioners' contention that the district

court's analysis of entry barriers was legally flawed because the district court had assessed the likelihood of entry at the time of the acquisition, rather than the likelihood of entry at a later date when, as a result of the acquisition, Excel and IBP might attempt to charge supracompetitive prices (*id.* at 17a). Similarly, the court dismissed petitioners' argument that the district court "should have considered a variety of other factors" that they claimed made collusion "difficult or impossible" (*ibid.*). The court held that the district court "properly confined its analysis to market share statistics plus limited information on industry structure, history and probable future" (*id.* at 18a). Finally, "[a]lthough the district court conceded [that] the predatory conduct was not certain to occur" (*id.* at 19a), the court of appeals found it appropriate for the district court to rely on Cargill's "deep pocket" because Cargill's "financial resources would likely be used in an anticompetitive fashion if Excel acquired Spencer Beef and then engaged in a period of predatory pricing" (*id.* at 20).

SUMMARY OF ARGUMENT

1. A private party has standing to challenge an alleged antitrust violation only if two conditions are satisfied. It must allege that it will suffer actual or threatened injury as a result of the violation. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 11-14; *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). In addition, it must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). The rationale of *Brunswick*, ensuring that the remedies available under the antitrust laws are not "divorce[d] * * * from the purposes of" those laws (*id.* at 487), is fully applicable to suits for injunctive relief under Section 16 of the Clayton Act.

Respondent Monfort did not allege *antitrust* injury to itself. It alleged that the acquisition would violate Section 7 of the Clayton Act by increasing concentration in the relevant markets, but—and the court of appeals recognized this key point—as a competitor Monfort would be helped, not hurt, if increased concentration led to supracompetitive pricing. Monfort also alleged that IBP and the defendants would (by "simply increas[ing] their production by working Saturdays" and "without them ever talking to each other" (Tr. 120)) subject Monfort to a "price-cost squeeze," but it is elementary that injury resulting from lawful intensified competition is not antitrust injury.

The court of appeals, however, stated that it considered the alleged price-cost squeeze to be "a form of predatory pricing." This was error both because Monfort had disclaimed any contention that Excel or IBP would engage in predatory pricing (*i.e.*, pricing below cost with the intent to destroy competitors and later raise prices), and also because the facts alleged fell far short of supporting any contention of a threat of predatory pricing.

Competitors' challenges to acquisitions should be viewed with great skepticism. Competitors stand to benefit from, and have no incentive to challenge, acquisitions that may lead to supracompetitive pricing. On the other hand, competitors have a substantial incentive to challenge acquisitions that will make their rivals more efficient, make their industry more competitive, and reduce the prices they can charge their customers. Rigorous insistence on allegations of *antitrust* injury to the plaintiff is therefore necessary if competitors are to be prevented from using the antitrust laws for anticompetitive purposes.

An allegation of antitrust injury based on a fear of post-acquisition predatory pricing by the resulting firm is clearly insufficient where that firm would not have a dominant market share. It is all too easy for a competitor who fears intense competition (precisely what the antitrust laws seek to encourage) to characterize that competition as "predatory pricing." Accordingly, plaintiffs alleging *actual* predatory pricing must generally es-

tablish, inter alia, that the defendant has a dominant position in the market. Where a plaintiff challenges an acquisition on the ground that it creates a possibility of *future* predatory pricing, he does not allege a "real and immediate threat" of antitrust injury to himself unless, at a minimum, he alleges that the defendant will dominate the post-acquisition market. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 110 (1983)). Thus, the court of appeals' holding here was clearly unjustified since, according to the district court's findings, Excel's post-acquisition share of the market would have been less than 21%, which would not even make it the largest firm in the market.

While the foregoing considerations are sufficient to decide this case, there are important reasons why the Court should take the further step of ruling that an allegation of threatened future predatory pricing is never sufficient to give a competitor standing to challenge an acquisition. Injunctive actions brought by competitors on a "predatory pricing" theory will often stifle procompetitive acquisitions, and they are likely to do so before the matter can reach this Court; such anticipatory lawsuits are not necessary to combat predatory behavior, which can be remedied if and when it actually occurs. In light of (1) a competitor's strong incentive to seek to scuttle a procompetitive acquisition and the high risk that a court challenge will do so, (2) the remoteness of the possibility that an acquisition will lead to predatory pricing, and (3) the ability of any competitor later faced with actual predatory pricing to invoke the prohibitions of the Sherman Act, the purposes of the antitrust laws would be best served by denying competitors standing to challenge acquisitions on the basis of predatory pricing theories.

2. Because respondent lacked standing, this Court need not reach the merits of its claim that the acquisition violated Section 7 of the Clayton Act. If the Court reaches this issue, however, the decision below should be reversed because the lower courts did not properly evaluate factors other than market share.

The court of appeals' conclusion that the acquisition was anticompetitive because it would increase the likelihood of predatory pricing was defective because it was unsupported by any evidence indicating that Excel could successfully pursue such a strategy. The court of appeals erroneously relied on the "deep pocket" of Excel's parent, Cargill, although nothing in Monfort's complaint or the record in this case suggested that, as a result of the acquisition, Excel was likely to engage in predatory pricing. Accordingly, Cargill's resources were irrelevant to the question whether the acquisition was likely substantially to lessen competition and therefore violated Section 7.

The lower courts also failed to take proper account of ease of entry, a factor critical to their conclusions that the acquisition would increase the likelihood of predatory pricing followed by supracompetitive pricing. The district court evaluated only the likelihood of entry at current profit margins, failing to appreciate that ease of entry constrains the exercise of market power. The court of appeals did not address that error, or the district court's errors in relying on absolute cost figures and ignoring evidence of recent entry into the market. Accordingly, if this Court reaches the merits of respondent's suit, the case should be remanded to consider whether entry would be likely in the face of a significant post-acquisition price increase.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENTS HAD STANDING TO SEEK INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT

A. A Private Plaintiff Seeking Relief Under The Antitrust Laws Must Allege That It Will Suffer Antitrust Injury

A plaintiff in an antitrust case, as in any other case, must of course allege that " 'he personally has suffered some actual or threatened injury' * * * [i]t is not enough that the conduct of which the plaintiff complains will

injure *someone*." *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis in original) (quoting *Gladstone* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)); [12] see, *e.g.*, *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 16-17; *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).[13] An antitrust plaintiff must also satisfy a second, and distinct, requirement: it must allege "antitrust injury." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983).[14]

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[12] See also *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983) ("A violation of the [Sherman] Act without resultant injury to the party bringing the claim is insufficient to confer standing."); *3 Penny Theater Corp.* v. *Plitt Theaters, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66,920, at 61,723 (N.D. Ill. Nov. 22, 1985) (plaintiff that suffered no injury as a result of illegal "split" agreements between motion picture distributors had no standing to challenge agreements).

[13] Section 16 itself commands courts to heed the "same conditions and principles" as govern "courts of equity" in granting injunctive relief (15 U.S.C. 26). As this Court held recently in *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 110 (1983), faithful adherence to those principles requires a plaintiff to allege a "real [and] immediate threat" of actionable injury before it has standing to pursue an injunction, even if the injury amounts to a constitutional violation and would support an action for damages (*id.* at 111). See also *Allen* v. *Wright*, slip op. 18) ("Despite the constitutional importance of curing the injury alleged by respondents * * * the federal judiciary may not redress it unless standing requirements are met.").

[14] The fact that standing in an antitrust context involves elements in addition to those required by Article III, and different from elements recognized in other contexts, is not unusual. Standing doctrine comprises both constitutional and prudential components (*Allen* v. *Wright*, slip op. 12-13), and this Court's standing decisions have long reflected a sensitivity to the nature of the particular claim being asserted. Thus, the standing requirements applicable to taxpayer suits (see, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)) differ from those applicable to suits challenging state criminal law enforcement policies (see, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)).

The requirement of antitrust injury, established in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), serves to ensure that the remedies available under the antitrust laws are not "divorce[d] * * * from the purposes of" those laws (*id.* at 487). In *Brunswick*, a group of bowling center owners sought damages for the defendant's acquisition of several of their competitors, claiming that they had been injured by the acquisitions because, absent the acquisitions, the competitors would have gone out of business. This Court held that plaintiffs lacked standing to bring such a claim because their complaint was in essence that they had been deprived of the benefits of decreased competition, a claim "inimical to the purposes" of the antitrust laws. *Id.* at 488. Noting that "[e]very merger * * * has the potential for producing economic readjustments that adversely affect some persons" (*id.* at 487), and that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*'" (*id.* at 488 (emphasis in original)), the Court rejected the contention that every injury "causally linked to an illegal presence in the market" (*id.* at 489) is sufficient to support recovery. Instead, a plaintiff is required to establish "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (*ibid.* (emphasis in original)). See also *Blue Shield* v. *McCready*, 457 U.S. 465, 478 (1982); *Associated General Contractors*, 459 U.S. at 540.

A plaintiff seeking an injunction under Section 16 need only allege threatened, not actual, antitrust injury. But it must still be injury "of a sort personal to the plaintiff" (*United States* v. *Borden*, 347 U.S. 514, 518 (1954)). And the rationale of *Brunswick*[15] requires a plaintiff seeking relief under Section 16, perhaps even more than

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[15] Because the petitioner in *Brunswick* did not contest the respondents' standing to seek an injunction (429 U.S. at 491), the Court had no occasion specifically to address the question of Section 16 standing.

a plaintiff seeking relief under Section 4 (15 U.S.C. 15), to allege "antitrust injury" personal to it: in the absence of such a requirement, the danger would be particularly acute in injunction cases that the antitrust laws are being invoked not to enhance and protect competition, but to shield competitors from it.[16] See *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66,974, at 62,001 (7th Cir. Mar. 4, 1986) ("the 'antitrust injury' rule applies to requests for damages and injunctions alike"); *Midwest Communications, Inc.* v. *Minnesota Twins, Inc.*, 779 F.2d 444, 452-453 (8th Cir. 1985) (plaintiff "must demonstrate threatened *antitrust* injury to receive injunctive relief") (emphasis in original); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211 (3d Cir. 1980); *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); Easterbrook & Fischel, *Antitrust Suits By Targets of Tender Offers*, 80 Mich. L. Rev. 1155, 1165-1166 & n.27 (1982); cf. *Brunswick Corp.* v. *Riegel Textile Corp.*, 752 F.2d 261, 266-268 (7th Cir. 1985), cert. denied, No. 84-1593 (June 17, 1985) (injunctive relief in the form of transferring ownership of patent inappropriate where injury alleged does not constitute antitrust injury); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354, 1357 (6th Cir. 1985).

[16] The court of appeals in this case suggested that the standing requirements under Section 16 were less stringent than those under Section 4 because the "threshold of proof beyond the section 7 violation remains lower than it would be in a section 4 case" (Pet. App. 4a). The court of appeals cited (*ibid.*) two cases for this proposition, *Board of Regents* v. *National Collegiate Athletic Association*, 707 F.2d 1147, 1151-1152 (10th Cir. 1983), aff'd, 468 U.S. 85 (1984), and *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211 (3d Cir. 1980). Neither case, however, held that *Brunswick's* requirement of antitrust injury is inapplicable to injunctive actions. In *Board of Regents* the court stated that "*Brunswick* does not apply with full rigor" to an injunctive action (707 F.2d at 1151), but it did not hold that any form of injury related to an antitrust violation was sufficient to establish standing. In *Schoenkopf*, the court specifically held that *Brunswick's* antitrust injury requirement is applicable to injunctive actions and, in fact, held that the plaintiff lacked standing because the injury it alleged was not antitrust injury (637 F.2d at 211).

Accordingly, the court of appeals was fundamentally wrong in concluding that "[i]n a section 16 case, *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation" (Pet. App. 5a). Indeed, because the quantum of proof necessary for securing injunctive relief is less than is required for damages but the effect of an injunction will often be greater, it is particularly important that courts adhere strictly to the requirement of antitrust injury in suits seeking injunctive relief under Section 16 if the antitrust laws are to serve their procompetitive purpose.

B. Respondent Did Not Allege That It Would Suffer Antitrust Injury

1. Monfort alleged that the acquisition would violate Section 7 of the Clayton Act by increasing concentration in the markets for fed cattle and boxed beef.[17] Increased concentration in a market may make it more likely that firms in the market will be able to charge supracompetitive prices, and thus threaten "antitrust injury" to customers, but no customer felt sufficiently threatened to sue here. As the court of appeals recognized, Monfort, unlike petitioners' customers, would be helped, not hurt, if prices rose above a competitive level. See Pet. App. 7a, 9a. The threat (if any) that the acquisition would lead to supracompetitive pricing was not a threat to Monfort, which therefore could not assert standing on that basis. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 19; see *Allen* v. *Wright*, *supra*; *Warth* v. *Seldin*, *supra*.

2. Monfort also alleged that after the acquisition the defendants would subject it to a "price-cost squeeze," in which the margin between the cost of the input (fed cattle) and the price of the output (boxed beef) would

[17] Complaint ¶ 34(a) and (c).

be insufficient to allow it to operate profitably. Monfort, like the plaintiff in *Brunswick*, was in essence alleging that it would be the victim not of antitrust violations but of competition.

Monfort expressly disclaimed any allegation that the acquisition would increase the likelihood of collusion between IBP and Excel or intensify the squeeze for that reason.[18] On the contrary, Monfort's president acknowledged that any post-acquisition pressure on other firms in the market would occur because Excel and IBP would compete vigorously against each other by "increas[ing] their production by working Saturdays, by being very aggressive in the marketplace" (Tr. 120). Nor did Monfort allege that IBP or Excel would price below their costs or engage in any other conduct that could properly be viewed as predatory.[19] Thus, on Monfort's own allegations, the "price-cost squeeze" on which its claim was based reflected only vigorous competition in the purchase of fed-cattle and the sale of boxed-beef. In sum, Monfort alleged no injury to itself except the effects of vigorous competition.

The objective of the antitrust laws is to protect competition, enhancing consumer welfare. *E.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). Even if the injury to Monfort hypothesized in the complaint were eventually to materialize, it would, as in *Brunswick*, flow

[18] Monfort also conceded that the "price-cost squeeze" it complained of had been a characteristic of the market for almost twenty years (Tr. 132) and further acknowledged that this squeeze was a consequence of the highly competitive nature of the beef industry (*ibid.*). See generally B. Marion, *supra*, at 123-124 (noting that the "1970's were particularly difficult for the beef subsector" because of a sharp rise in feed grain prices and stable demand for beef).

[19] Indeed, Monfort admitted that given the intensely competitive nature of the industry, Excel would seek to gain market share regardless of whether the acquisition went forward (Tr. 152). Monfort simply objected to what it viewed as Excel's attempt to "leapfrog in size" (*id.* at 159).

not from any diminution of competition, but from competition itself. Such an injury is not antitrust injury.

3. The court of appeals ignored the allegations that Monfort actually made and ruled that Monfort had standing to challenge the acquisition because, in the court's view, the allegedly threatened price-cost squeeze constituted "a form of predatory pricing" (Pet. App. 7a). This was error for two reasons. First, Monfort did not allege in its complaint or at trial that Excel or IBP would engage in below-cost pricing, either unilaterally or as the result of collusion.[20] See *Associated General Contractors*, 459 U.S. at 526 (footnote omitted) (court may not, in determining standing, "assume that [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"). Second, and more fundamentally, there was no reason to infer a threat of predatory pricing on the facts alleged by Monfort.

Even if an allegation of a threat of future predatory pricing had been made in this case, such allegations, made by competitors seeking to block acquisitions, should be viewed with extreme skepticism, for precisely the reason stated in *Brunswick*, *i.e.*, to avoid use of the antitrust laws to achieve "results inimical to their purposes." Competitors have a strong incentive to seek to block acquisitions that are likely to create more efficient rivals and so increase competition. Injunctive actions by competitors can easily delay and frustrate acquisitions that will increase competition.[21] The threat of increased com-

[20] As the district court correctly noted (Pet. App. 71a), "Monfort does not allege that IBP and Excel will in fact engage in predatory activities as part of the price-cost squeeze."

[21] In giving the Justice Department and the Federal Trade Commission broad powers to review mergers and acquisitions prior to consummation under Section 7A of the Clayton Act, 15 U.S.C. 18a, Congress recognized that these procedures inevitably create delay that may jeopardize socially beneficial mergers, and therefore imposed strict deadlines on government agencies (15 U.S.C. 18a(b) and (e)(2)), provided for maximum judicial expedition in the event

petition following an acquisition, however, is not antitrust injury. See Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985).[22] Except in the rarest of cases, price reductions following an acquisition represent the results of intensified competition, and while they may disturb the slumber of rivals who prefer not to "work Saturdays," they are good, not bad.[23]

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the government elects to file suit (15 U.S.C. 18a(f)), and established an "early release" procedure for transactions determined by the government agencies not to impose any risk of anticompetitive effects (15 U.S.C. 18a(b)(2)). Allowing private competitors routinely to file suit to block transactions cleared by the Antitrust Division or the Federal Trade Commission creates some tension with the government's unique, albeit not exclusive (see 15 U.S.C. 18a(i)(1)), antitrust enforcement role. Cf. *United States* v. *Borden*, 347 U.S. 514, 518 (1954) (a private plaintiff "may be expected to [seek injunctive relief] only when his personal interest will be served"); *Buckeye Coal Co.* v. *Hocking Valley Co.*, 269 U.S. 42, 48-49 (1925). These provisions suggest that the courts should recognize the congressional intention to permit procompetitive or competitively neutral transactions to proceed without undue delay and should be sensitive to the possibility that a competitor may have a strong incentive to use the antitrust laws to block or delay a merger precisely because the transaction promises to enhance competition.

[22] See also *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 859-860 & n.12 (2d Cir.) (Friendly, J.), cert. denied, 419 U.S. 883 (1974); 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 901 (1978). In contrast, if a merger seems likely to change market structure so as to enable remaining firms to restrict output and raise prices, competitors will stand to benefit and will therefore have little incentive to sue. *Ibid.* Yet it is precisely these mergers that Section 7 proscribes. See 4 P. Areeda & D. Turner, *supra*, ¶ 901b (1980).

[23] Cf. A. Smith, *The Wealth of Nations* 461 (E. Canaan ed. 1937) ("it always is and must be the interest of the great body of the people to buy whatever they want of those who sell it cheapest. The proposition is * * * manifest [and] could * * * [never] have been called in question, had not the interested sophistry of merchants and manufacturers confounded the common sense of mankind. Their interest is, in this respect, directly opposite to that of the great body of the people.").

Competitors will understandably tend to characterize any price with which they cannot compete as "predatory."[24] But "cutting price in order to increase business often is the very essence of competition" (*Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, slip op. 19), even if, as is usually the case, it promises to increase one seller's market share at the expense of its rivals.[25] The courts should therefore be careful to avoid mistakenly condemning lawful price cuts, which are evidence of competition at work, on the ground that they constitute unlawful predatory pricing: predatory pricing occurs only when a firm sets prices below cost in an attempt to destroy its rivals so that it can later raise prices.[26] As the Court has recently indicated, "mistaken inferences" in cases involving claims of predatory pricing "chill the very conduct the antitrust laws are designed to protect" (*ibid.*).

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[24] See 3 P. Areeda & D. Turner, *supra*, ¶ 711a, at 151 (1978) ("Unhappy rivals may automatically assume predation when a competitor's price is below their costs, disregarding the possibility that the alleged predator's cost is well below theirs and more than covered by his price."); R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes and Other Materials* 682 (2d ed. 1981) ("allegations of predatory pricing should be understood as attempts by inefficient firms to obtain protection from their lower-cost (and hence lower-price) rivals"). For example, in this case Mr. Monfort testified that the "price-cost squeeze" that had existed for 20 years in the beef industry resulted from competition (Tr. 133), while claiming simultaneously that "some efficient producers have been squeezed out, too" (*id.* at 134). If—as Mr. Monfort readily conceded—the industry was competitive, only the least efficient firms would be driven from the market.

[25] 3 P. Areeda & D. Turner, *supra*, ¶ 711a; *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 927 (1st Cir. 1984), cert. denied, No. 84-1353 (Apr. 15, 1985); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

[26] *Southern Pacific Communications Co.* v. *AT&T*, 740 F.2d 980, 1003 & n.27 (D.C. Cir. 1984), cert. denied, No. 84-1080 (Feb. 25, 1985); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); R. Posner & F. Easterbrook, *supra*, at 683; 3 P. Areeda & D. Turner, *supra*, ¶ 711a; R. Bork, *The Antitrust Paradox* 154-155 (1978).

Since a dominant share of the market is generally a necessary (although not a sufficient) precondition to a finding of *actual* predatory pricing,[27] a plaintiff challenging a rival's acquisition on the theory that there is "real [and] immediate" threat of *future* predatory pricing plainly should be required, at a minimum, to allege that the acquisition will create a firm with a dominant market share. When the defendant lacks a dominant position, the possibility that it will successfully undertake predatory pricing and succeed in driving out its rivals and later raising prices to a supracompetitive level is

[27] See *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 130 (2d Cir.), cert. denied, 454 U.S. 968 (1981) (sound analysis permits examination of a defendant's pricing behavior only after evidence of monopoly power is shown). Because predatory pricing is rational only where the predator expects to recoup its losses when it attains sufficient market power to increase price, claims of unilateral predatory pricing arise in the context of Section 2 of the Sherman Act in cases alleging actual or attempted monopolization. To establish the offense of monopolization under Section 2, a plaintiff must demonstrate, inter alia, that the defendant possessed monopoly power. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). A necessary element of an attempted monopolization case is a showing that there is a dangerous probability that the defendant would succeed in monopolizing the relevant market. See, *e.g.*, 3 P. Areeda & D. Turner, *supra*, ¶ 820; *D.E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F.2d 1431, 1435 (6th Cir. 1983), cert. denied, 467 U.S. 1242 (1984). "Dangerous probability" of success in monopolizing a market does not, of course, require that a firm already have monopoly power, but it does generally require at least that it have sufficient market power, typically reflected in a high market share, to dominate the market. See *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982) (dangerous probability of success element of Section 2 attempt offense requires a finding that the defendant possesses "market strength that approaches monopoly power"; 30% share of relevant market insufficient); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 271 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982) ("numerous courts have found a market share of 30% or higher to be insufficient, by itself, to prove a dangerous probability of monopolization"). But see *Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 533 & n.18 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

highly speculative,[28] whereas the likelihood that the plaintiff is in fact seeking to inhibit vigorous competition is extremely high. Cf. ***Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.***, slip op. 18-19. The frequent result of allowing such cases to proceed will be to stifle procompetitive acquisitions.[29]

Under the district court's findings, Excel's post-acquisition share of the output market would have been less than 21%, making it clearly not a dominant firm. Indeed, its main rival and the largest firm in the industry, IBP, possessed a much larger share of the market. Monfort's president acknowledged that the beef industry is highly competitive, and there was no allegation by Monfort that Excel or IBP had in the past engaged in either unilateral or collusive predatory pricing.[30] In these circumstances, there was no basis for a conclusion that the merger here would create a "real [and] immediate threat" of predatory pricing. Accordingly, the court of appeals erred in concluding that Monfort had standing because the price-cost squeeze might constitute a predatory strategy.

C. The Possibility Of Future Predatory Pricing Should Not Afford Standing To A Competitor To Challenge An Acquisition

Because respondent failed even to allege that petitioners would engage in post-acquisition conduct that could

[28] See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 220-221 (1979).

[29] See *Missouri Portland Cement Co.* v. *Cargill Inc.*, 498 F.2d at 870 (noting that "grant of a temporary injunction" "spells the almost certain doom of a tender offer"); Kaplan, *Antitrust Tactics In Contested Takeover Bids* (Oct. 19, 1982), *reprinted in* Practicing Law Institute, *Twenty-Second Annual Advanced Antitrust Seminar* 759-760 (1982) ("A preliminary injunction restraining the bid on antitrust grounds is almost always a 'showstopper' * * *. [T]here is usually no quick and easy means to solve the antitrust problem.").

[30] Mr. Monfort conceded that there was "[g]ood tough competition" in the industry (Tr. 127), and that he thought it was "unlikely" and had "no reason to think" that IBP and Excel would enter into a collusive agreement to depress prices after the acquisition (*id.* at 130).

properly be viewed as predatory, the Court could await another case before deciding whether an alleged threat of post-acquisition predatory pricing is *ever* sufficient to afford a competitor standing to challenge an acquisition. There are, however, sound practical reasons for the Court to consider the issue now: an antitrust complaint that can withstand a motion to dismiss is often not hard to frame,[31] and the mere pendency of lawsuits will often be fatal to future procompetitive acquisitions before they can reach this Court.[32] Allowing competitors' suits to proceed on a predatory pricing theory thus invites competitor suits that will frustrate procompetitive acquisitions and "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, slip op. 19. Since post-acquisition price-cutting is unlikely to constitute predatory pricing, and other remedies are available if and when it does, there is much to be gained from a ruling in this case that competitors may not challenge acquisitions on the ground that there is a threat of post-acquisition predatory pricing.

1. As this Court has observed, "there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." *Matsushita*, slip op. 17.[33] As least two essential conditions must be

[31] Even if plaintiffs are required to allege that an acquisition will create a firm with a dominant market position, complaints will be subject to prompt dismissal only in those cases where the plaintiff cannot, consistent with the requirements of Rule 11, Fed. R. Civ. P., contrive an alleged market in which the merged firms will have such a position.

[32] As pointed out in our brief in support of the petition (at 15), it is unlikely that another case raising this issue will be pursued to this Court. This case has reached this Court because of an unusual feature of the acquisition agreement: it failed to give the purchaser the right to back out if the acquisition was enjoined.

[33] Cases where predatory pricing has been successfully proven are very rare. See Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105, 111-112 (1971) (concluding that of 26 cases where liability was imposed for predatory pricing, in only seven was predation actually attempted, and

met before a predatory pricing strategy will be successful. First, in order to have the *ability* to engage in predatory pricing, the would-be predator must be capable of rapidly expanding its output to provide the additional quantity of the product demanded as a result of its price reduction and to make up for any resulting reduction in the quantity supplied by its competitors.[34] Second, barriers to entry must be sufficiently high that new firms cannot profitably enter, or old firms profitably reenter, the market when predatory pricing has driven out competitors and the predator seeks to raise prices to supracompetitive levels. If firms can easily enter and exit a market, predatory pricing will not succeed because the predator will be unable to recoup the losses resulting from its earlier, below-cost pricing.[35]

Even if these minimum conditions are met, however, a firm may well have no *incentive* to engage in predatory pricing. For example, the larger a firm's market share,

in only three or four was the attempt successful); Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 Vand. L. Rev. 63, 140-143 & nn. 294-295, 156-157 (1982); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 699 (1975) (footnote omitted) ("proven cases of predatory pricing have been extremely rare"); Miller & Pautler, *Predation: The Changing View in Economics and the Law*, 28 J.L. & Econ. 495 (1985); cf. R. Bork, *supra*, at 154 (noting that predatory pricing is rare, and that "[i]t seems unwise, therefore, to construct rules about a phenomenon that probably does not exist or which, should it exist in very rare cases, the courts would have grave difficulty distinguishing from competitive price behavior").

[34] *Cf.* R. Bork, *supra*, at 147, 149 "[p]redation is a war of attrition, with its outcome determined by the combatant's relative losses and reserves" and "[t]he losses during the war will be proportionally higher for the predator than for the victim" because the predator must satisfy all of the increased demand at predatory prices.

[35] See Ordover & Willig, *An Economic Definition Of Predatory Product Innovation* (undated), *reprinted in* Federal Trade Commission, *Strategy, Predation, and Antitrust Analysis* 301, 304-307 (1981); 3 P. Areeda & D. Turner, *supra*, ¶ 711b; R. Bork, *supra*, at 149-154; *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 89 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

the more expensive it will be for that firm to undertake a predatory pricing strategy. *Matsushita*, slip op. 17. The costs of predatory pricing are immediate, while the rewards are delayed and uncertain. *Id.* at 13-14; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 273-275 (1981). Thus, even a firm with a dominant share of the market will generally find it more profitable to exercise the market power resulting from its dominant position by simply raising prices and allowing competitors to price under its "umbrella." [36]

2. An acquisition will not necessarily increase a firm's ability or incentive to engage in predatory pricing. An increase in concentration does not raise entry barriers. Nor does the increase in market share resulting from an acquisition have any necessary bearing on a firm's incentive to engage in predatory pricing: although acquiring market share by acquisition may move a firm closer to a point where it will be able to exercise market power to raise prices, increased market share increases the losses it will incur if it engages in below-cost pricing. Finally, although it is conceivable that an acquisition might be aimed at providing a would-be predator with the unused productive capacity necessary to expand output as part of a predatory pricing scheme, there is no predictable relationship between making an acquisition that increases a firm's market share and acquiring the unused capacity necessary to implement such a scheme.

3. Given the strong incentive of competitors to challenge procompetitive acquisitions, the rarity of predatory pricing, and the absence of any predictable relationship between increased market share and the likelihood of

[36] Regardless of a firm's market share, predatory pricing is not a rational strategy unless the expected future payoff, adjusted for the possibility that the strategy will fail and discounted to the present at the appropriate rate, exceeds the present value of the sum of (1) the immediate and substantial expenses of sustained below-cost pricing, (2) the forgone profits from an alternative strategy of raising prices immediately, and (3) the expected value of the damage liability if the predatory pricing is successfully challenged under the Sherman Act.

successful predatory pricing, it is inconsistent with the purpose of the antitrust laws to afford competitors standing to challenge acquisitions under such a theory. Granting competitors standing will inevitably frustrate many acquisitions that promise to increase consumer welfare.[37] Denying competitors standing, on the other hand, would not leave them or the public without a remedy for anticompetitive mergers. The government, or private parties threatened with the antitrust injury that Section 7 seeks to prevent, *i.e.*, supracompetitive pricing, will be able to seek an injunction. And competitors that are actually injured as a result of predatory pricing following an acquisition will be able to invoke the prohibitions of the Sherman Act. Under such circumstances, we submit that the danger of allowing a competitor to challenge an acquisition on the basis of necessarily speculative claims of post-acquisition predatory pricing far outweighs the danger that any anticompetitive merger will go unchallenged.

II. THE LOWER COURTS ERRED IN DETERMINING THAT THE ACQUISITION WOULD VIOLATE SECTION 7 OF THE CLAYTON ACT

Because the respondent lacked standing to sue under Section 16, it is unnecessary for this Court to consider whether the court of appeals erred in upholding the district court's finding that the acquisition would violate Section 7. However, should this Court determine that the standing issue is not dispositive of this case, the decision below should be reversed because the lower courts' analysis of the key issue under Section 7—the likelihood that the proposed acquisition might tend "substantially to lessen competition"—was seriously defective. In deciding to enjoin the acquisition, the district court did

[37] See note 2, *supra*; see also Baumol & Ordover, *supra*, 28 J.L. & Econ. at 254 ("Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors * * * intimida[ting a potential defendant] into the sort of gentlemanly competitive behavior that is the antithesis of true competition."); Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L.J. 587, 588-590 (1973).

not properly evaluate any factors other than the increase in market share in the narrowly defined markets it found. The court of appeals repeated this error in holding that the district court was not required to engage in anything more than a "limited inquiry" into factors other than market share in evaluating the legality of the acquisition.

A. A "Deep Pocket" Parent Does Not Increase The Likelihood Of Predatory Pricing

The court of appeals not only based Monfort's standing on the supposed threat of predatory pricing but also based its conclusion that the acquisition was illegal on the same supposed threat (Pet. App. 19a-20a). But nothing in the record suggests that the acquisition was likely to lead to predatory pricing.[38]

The court of appeals relied primarily on its view that the "deep pocket" of Cargill, Excel's parent, "would likely be used in an anticompetitive fashion if Excel acquired Spencer Beef and then engaged in a period of predatory pricing." Pet. App. 20a. In analyzing this issue, however, the court of appeals simply assumed its conclusion, *i.e.*, that Excel would engage in predatory pricing. If the post-acquisition structure of the industry made it impossible or irrational for Excel to engage in predatory pricing, a "deep pocket" would only enable Excel to lose more money.[39] The financial resources of

[38] Because certain portions of the record in this case are subject to a protective order, we have not been able to review the entire record. The respondent, however, specifically disclaimed any reliance on such a theory in the district court (Pet. App. 71a) and did not attempt to justify the district court's holding on this basis in the court of appeals.

[39] See 5 P. Arceda & D. Turner, *supra*, ¶ 1136c (1980) (reviewing cases expressing concern with effect of "deep pocket" on possible predation, concluding that cases "fear predation too much * * *. Predation cannot be considered a significant likelihood where the market circumstances preclude a payoff substantially exceeding the losses suffered in the course of destroying rivals"). See also *Emhart Corp* v. *USM Corp.*, 527 F.2d 177, 181 (1st Cir. 1975); *Missouri Portland Cement Co.* v. *Cargill*, 498 F.2d at 865-866.

Excel's parent are thus beside the point. Indeed, Excel, with its "deep pocket" parent, was in this market before the acquisition, and there is no claim that it had engaged in predatory pricing,[40] or had unsuccessfully sought the capital with which to finance such predatory pricing. Accordingly, the likelihood that the acquisition would lessen competition by increasing the probability of predatory pricing amounted to nothing more than an "ephemeral possibilit[y]" that could not suffice to establish a violation of Section 7. *Brown Shoe* v. *United States*, 370 U.S. 294, 323 (1962).

B. The Lower Courts Failed To Evaluate Properly The Possibility Of Market Entry

In determining that the acquisition was anticompetitive, the lower courts relied primarily on its effect on concentration in the relevant markets. Monfort's claim of threatened injury is inconsistent, however, with a conclusion that the acquisition would increase the likelihood of supracompetitive pricing. Even accepting the district court's findings as to the relevant markets,[41] the lower courts' findings form an insufficient basis for a conclusion that there is a "reasonable probability" that this acquisition will substantially lessen competition.

A merger's effect on concentration within an industry provides an important starting point for merger analysis. But market share statistics cannot alone be determinative of the legality of an acquisition.[42] Because Section 7 pro-

[40] See R. Bork, *supra*, at 251 (noting that "the law certainly cannot sensibly apply a presumption that the mere possession of capital will probably lead to * * * predation").

[41] Petitioners do not challenge these specific findings in this Court (Pet. 25-26). They contend, however, that the district court failed to take account of the evidence as to potential increases in supply on the input side of the market (*id.* at 26), and the ability of producers of non-boxed beef to shift to boxed-beef production on the output side of the market (*ibid.*).

[42] Even in cases involving highly concentrated markets, the Department of Justice and the FTC do not challenge a merger without

scribes transactions creating a "reasonable probability" of an adverse effect on competition,[43] courts must necessarily consider relevant factors other than market share statistics in deciding whether a merger would violate Section 7. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Brown Shoe*, 370 U.S. at 322 n.38. Although both lower courts acknowledged this responsibility, the district court erroneously discounted a critical factor—ease of entry—and the court of appeals failed to correct that error.[44]

The district court determined that there were significant barriers to entry in the relevant markets on the basis of findings that it would cost $20 to $40 million and take 12 to 18 months to construct new slaughter and fabrication facilities with a minimally viable capacity (Pet. App. 65a).[45] The court found that these costs and delays constituted "formidable barriers to new entrants"

considering other relevant factors. U.S. Dep't of Justice, *Merger Guidelines* § 3.11(c) (June 14, 1984); Federal Trade Commission, *FTC Statement Concerning Horizontal Mergers* 2 Trade Reg. Rep. (CCH) ¶ 4516 (1982).

[43] See *Brown Shoe*, 370 U.S. at 294 n.39 (citation omitted) (noting that although Congress sought to arrest anticompetitive tendencies within an industry in their incipiency, the legislative history is "explicit" that the Clayton Act "'would not apply to the mere possibility but only to the reasonable probability of the proscribed * * * effect'").

[44] The lower courts' failure to analyze properly the evidence as to ease of entry also undercuts their conclusions with respect to the likelihood of predatory pricing resulting from the acquisition.

[45] The court found that it also would be difficult to find and costly to acquire and refurbish existing facilities (Pet. App. 66a). The court's conclusion in this regard was based on Excel's internal reports noting that there were few fully integrated beef packing facilities available for acquisition (*ibid.*). But the evidence indicated that non-integrated facilities were available (Tr. 398, 402-403). Indeed, Val-Agri's entry involved the purchase of existing facilities that were modernized and expanded (*id.* at 282-283). The district court, however, without citing any evidence, stated that it was "persuaded that * * * the cost associated with refurbishing old facilities constitute[s a] significant barrier[] to [entry]" (Pet. App. 66a).

when "combined with the previously discussed low profit margins in the beef industry" (Pet. App. 65a).

The district court erred by focusing solely on current profit margins. Ease of entry is relevant because if an incumbent firm attempts to raise prices and reduce output, new entry may occur, lowering prices. See *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 982-984 (2d Cir. 1984); see also *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 629-630 (1974) (noting that regulatory barriers to entry reduce the extent to which firms outside the market are perceived as potential entrants). The key question, therefore, is whether new firms would be induced to enter the market in response to a small but significant, non-transistory increase in price.[46] The district court, however, gauged the likelihood of entry solely with reference to current profit margins, even though it was conceded throughout the trial that the low profit margins within the industry reflected the highly competitive nature of the market.

Similarly flawed was the court's reliance on the absolute size—in dollar terms—of the investment required to enter the market. Absolute cost figures have little or no meaning in assessing whether entry is likely;[47] if the return on an investment, adjusted for risk, is at or above market levels, well functioning capital markets such as ours will provide the funds. Nor does the time period for entry cited by the district court constitute a significant barrier to entry in a market such as this.[48]

[46] The Department of Justice *Merger Guidelines*, *supra*, §§ 2.11, 3.3, posit a 5% increase lasting two years as a general rule.

[47] See 2 P. Areeda & D. Turner, *supra*, ¶ 409e (1978). If, as the district court concluded, $20 to $40 million ipso facto constitutes a significant entry barrier, it would necessarily follow that the law must presume that entry barriers are high in even modestly capital intensive industries. But as the record in this very case makes clear (Tr. 111), a $20 to $40 million investment is not beyond the capacity of even individual investors.

[48] See *Merger Guidelines*, *supra*, § 3.3 (positing a two-year period for entry).

Finally, in concluding that entry barriers were prohibitively high, the district court simply dismissed the most probative evidence on this point—the recent entry of Val-Agri, a firm that the respondent itself testified was a strong competitor (Tr. 126). Nor did the district court consider whether a post-acquisition increase in prices would elicit increased production on the part of firms already in the industry, although the evidence indicated that production by existing firms could be rapidly increased without significant additional capital investment.[49]

The court of appeals uncritically accepted the district court's finding that there were significant barriers to entry without addressing petitioners' contention that the district court's analysis of this issue was flawed. At a minimum, the court of appeals should have remanded this case for the district court to consider whether entry was likely in the face of a significant, post-acquisition price increase. Without such a finding, there is no basis for a conclusion that the acquisition would permit supracompetitive pricing, and thus no basis for the lower court's holding that the acquisition violates Section 7 of the Clayton Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

[49] Tr. 143 (production doubled by adding second shift). See also Tr. 128, 160; Declaration of D. Neubauer at 11-12.

Respectfully submitted.

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APRIL 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20177

AMICUS CURIAE

BRIEF

(7)

No. 85-473

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. AND EXCEL CORPORATION,
Petitioners
v.
MONFORT OF COLORADO, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Business Roundtable respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

The Business Roundtable is an association of about 200 chief executive officers of substantial and diverse companies. The interest of the Business Roundtable arises from its members' concern that the antitrust laws serve to foster and maintain a competitive marketplace. The

parties in this case, quite naturally, focused their arguments on the facts of the beef-packing industry and have not stressed the impact of this case on the business community as a whole. The precedent established in this case could result in a proliferation of antitrust suits by competitors for potentially anticompetitive purposes. Members of the Business Roundtable are concerned that this Court be fully informed about the undesirable practical consequences of a rule that would make it easy for business entities to obtain standing to challenge proposed mergers of their competitors.

The brief which *amicus curiae* requests permission to file contains a more complete explanation of the potential abuse of antitrust proceedings for anticompetitive purposes. It is intended to provide a fuller understanding of the antitrust standing issue and should assist the Court in the articulation of a standard that serves the procompetitive purposes of the antitrust laws.

For the foregoing reasons, the Business Roundtable requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

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BRIEF FOR THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and by category of business. The Roundtable was founded in 1972 in the belief that business executives should take an increased and open role in the continuing debates about public policy. Their interest includes the way in which laws are shaped, interpreted and enforced by the three branches of government.

The companies represented in the Roundtable are substantial producers and consumers of goods and services, and they also do business in a highly competitive marketplace. They therefore have a vital interest in effective enforcement of the antitrust laws. They also have an immediate interest in the extent to which antitrust laws and antitrust enforcement affect business strategies and business decisions. The question of competitor standing to challenge business transactions like mergers and acquisitions has a practical impact on their business plans and on the manner in which they do business.

The policy considerations involved in this proceeding have been addressed by the United States Department of Justice in its *amicus curiae* brief in support of the petition for certiorari. The Business Roundtable submits this brief in order to emphasize the practical impact of the decision in this case and to underscore the need for reversal of the decision below.

SUMMARY OF ARGUMENT

An antitrust suit to enjoin a proposed merger is a powerful weapon in the hands of a competitor. For a relatively small cost a competitor can prevent the emergence of a potentially vigorous, more efficient rival or, at a minimum, blunt the new firm's competitive zeal. This result, which perverts the antitrust laws, is invited by the Tenth Circuit's decision in this case.

Under the decision below respondent, Monfort of Colorado, Inc., enjoys standing to challenge a merger which passed muster under Department of Justice and Federal Trade Commission pre-clearance procedures required by Section 7A of the Clayton Act, 15 U.S.C. § 18a. Under the applicable case law and their own Guidelines, these government agencies evaluate mergers to see whether they will produce a less competitive market which is likely to result in *higher* prices. Monfort's standing, on the other hand, rests on an attenuated, speculative claim

that the merger will result in *lower* prices. Simply stated, Monfort claimed, and the Tenth Circuit assumed, that because the merged entity will have access to a deeper pocket, it will be better able to price aggressively. It was further assumed that the post-merger prices will be likely to violate the antitrust laws and cause harm to Monfort. This reasoning would support competitor standing to enjoin virtually any merger and, if widely accepted, would have a devastating impact on business efforts to achieve efficiencies.

Mergers are most often motivated by the prospect of combining assets and resources into larger pools (so-called "deeper pockets") that can be managed more efficiently. The desired result is a more vigorous competitor capable of generating greater output at lower cost. These predictions are not always fulfilled, of course, but the mergers which are most likely to produce desired efficiencies are those most likely to be challenged by a competitor under the theory sanctioned by the court below. The antitrust laws then become a tool for anti-competitive behavior. A competitor need only allege that the new firm will be able to lower prices in order to commence a complex proceeding that in many cases will effectively prevent a merger, regardless of whether the suit is ultimately successful on the merits.

This brief invites the Court's attention to the perverse practical consequences of the Tenth Circuit's decision. For the reasons expressed below, this Court should reverse that decision and prohibit competitor interference in mergers where the claimed injury is precisely the opposite of that which the antitrust laws are designed to prevent.

ARGUMENT

I. Competitors Challenge Mergers for the Wrong Reasons.

It is reasonable to assume that a firm like Monfort which seeks to prevent a merger of two horizontal competitors primarily fears increased competition. The prospect of softer competition, which animates the merger laws, is not likely to concern a competitor. The decision below permits any firm to challenge the formation of a larger, potentially more efficient rival on the ground that it may compete too well.[1] Access to antitrust injunctions will give business rivals a swift and effective non-market tool to blunt competition.

Businesses have discovered that the antitrust laws can be used to discipline the competitive behavior of their rivals.[2] When a competitor builds a better mousetrap and sells it cheaper, he risks an antitrust suit. *See, e.g.*, Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 78 Duke L. J. 1353 (1978); Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985); *accord* Miller, *Comments on Baumol and Ordover*, 28 J. L. & Econ. 267 (1985). Competitors normally do not sue to maintain competition in accord with national antitrust policy; they sue to reduce competition or to insulate themselves from the effects of successful competition by claiming that it is unfair or predatory. This Court has recognized the risk and held, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477

[1] The justification for standing is that the new firm will be able to engage in predatory pricing. As we discuss in Section II, this rationale is ephemeral.

[2] As one business journal observed, "What passes these days for antitrust law . . . boasts many dubious aspects, but perhaps none so pernicious as the powerful incentive it holds out to litigious, dog-eat-dog competitors to employ it against their business rivals." Barron's, August 21, 1978, at 7.

(1977), that to maintain a cause of action in antitrust, competitors must prove injury of the type the antitrust laws were intended to prevent. The decision below undercuts this important limitation.

Expanded competitor access to antitrust injunctions would have far-reaching ramifications. Most mergers and acquisitions are time-sensitive transactions. Once a transaction is subject to the unpredictable delays inherent in an antitrust proceeding, its economic viability must be re-examined.

> [M]ergers occur in a dynamic economic context in which the court has control over only a small part of the situation. For this reason it is often difficult to maintain the status quo. If the court grants a preliminary injunction, the merger frequently is abandoned; the plaintiff gets his relief without a hearing on the merits. The court can preserve the separateness of the merger partners, but it cannot hold static the economic circumstances that made the merger attractive to the parties as a business decision. [Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L. J. 587, 588-589 (1973).]

For these reasons, it is common for a merger agreement to be made contingent on antitrust liability; if an antitrust challenge is raised, the parties are free to walk away from the deal. A competitor can therefore scuttle a merger that promises to increase competition merely by initiating an antitrust action. If, as here, standing is based only on a claim that the merger will create a deeper pocket, it will encourage the use of litigation for anticompetitive purposes. *See, e.g., Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) ("the grant of a temporary injunction on antitrust grounds at the behest of a target company spells the almost certain doom of a tender offer"), *cert. denied*, 419 U.S. 883 (1974); *H. H. Robertson Co.* v. *Guardian Industries Corp.*, Nos. 85-3232 & 3233 (Oct. 3, 1985)

(available January 9, 1986, on LEXIS, Genfed library) *reh'g en banc granted*, (3d Cir. Feb. 12, 1986).

A study by the Antitrust Section of the American Bar Association found that plaintiffs who wish to prevent mergers or acquisitions frequently achieve their objectives merely by filing suit and obtaining preliminary relief. Most actions never proceed to a trial on the merits. ABA Antitrust Section, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act Law and Policy* 56-58 (Monograph No. 1) (1977).

The use of private litigation to thwart efficiency-creating mergers is particularly anomalous since the passage of the Hart-Scott-Rodino Act in 1976. That statute insured that the Department of Justice and the Federal Trade Commission had the opportunity to review all significant mergers in advance. In the course of that review, these antitrust agencies can and do solicit the views of other interested parties, including competitors. Competitors frequently can supply useful information about the likely impact of the merger, but the antitrust agencies are best able to weigh that information and distinguish between public concerns and those that are purely private. Moreover, the Hart-Scott-Rodino law implicitly recognizes that timing is critical in merger transactions and imposes strict time limits on the process of review. This carefully balanced statutory scheme will be undercut if private parties, with a private agenda, are allowed to block a merger that has survived the mandated public scrutiny.

Commentators have observed that antitrust suits can be used to obtain multiple objectives inconsistent with antitrust policy. The suits are expensive and difficult to defend, and the mere fact of filing creates settlement pressures. Suits may be filed to extract economic "rents" from competitors in the form of treble damages or settlements. *See* Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & Econ. 405, 430-435 (1985); Baumol & Ordover, *supra*. Suits may be filed to force competitors to modify effective competitive behavior. *See* Austin, *supra* at 1353-54, 1360-66. Professor Austin observed, for example, that some businesses have learned to use claims of predatory practices to force leading competitors into settlement agreements that soften competition in such vital areas as price and technological innovation. *Id.*

At the same time, private antitrust actions are an important part of the overall enforcement scheme. The *Brunswick* standing test, which screens out those private actions that do not assert antitrust injury, is an important tool for distinguishing between pro-competitive and anti-competitive suits. If courts do not apply this standing test, competitors will be able to use the antitrust laws to ease competitive pressures from their rivals. *See* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 33-34 (1984). If the decision below is not reversed, the misuse of antitrust litigation will only be encouraged. Mergers that would otherwise sharpen competition will be blocked by competitors who claim, in effect, that the new entity will compete too much and too well.

II. The Lower Court's Rationale for Standing Would Condemn All Mergers.

The gravamen of respondent's complaint is that, once merged, the combined entity will be big enough to implement a cost-price squeeze and thereby drive competitors from the marketplace. *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 575-576 (10th Cir. 1985). The Tenth Circuit concluded that this is "a plausible theory for how [Monfort] may be injured by Excel's putative section 7 violation." *Id.* at 576. Having identified a "plausible theory," the Court of Appeals concluded that

Monfort had standing to seek an injunction to block the proposed merger. *Id.* at 577-578.

Section 7 of the Clayton Act addresses future probabilities and deals with potentially anticompetitive conditions at an incipient stage. But, the prohibitions against predatory pricing[3] are incipiency statutes too; unreasonably low prices are condemned because of a theoretical risk that in the future competition will disappear and then the survivor will be able to raise prices to monopolistic levels. The decision of the court below is based on a kind of "incipiency squared" argument: increased resources might possibly lead to aggressive pricing which might possibly lead to competitive injury. The only way to answer this kind of argument would be to deny the existence of efficiencies which motivate, and which should justify, a merger in the first place.[4]

The Court of Appeals acknowledged that there exists a profound debate over "the nature and very existence of predatory pricing." 761 F.2d at 575. Commentators have argued that it is so costly and so risky that it would rarely, if ever, occur. *See* R. Bork, *The Antitrust Paradox* 149-155 (1978); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 493-495 (1981).[5] Moreover, respected scholars and many courts have struggled to distinguish predatory pricing from vigorously competitive pricing.

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[3] Section 2 of the Sherman Act, 15 U.S.C. § 2 and Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a).

[4] A claim of actual predatory pricing is hard enough to defend. See n.6 *infra*.

[5] A large firm may have deeper pockets than its rivals, but it will also lose more money in a price war, to the extent it has a higher market share. The losses are current dollars; the potential gains are speculative future dollars. The strategy cannot work if entry is easy. In addition to its expensive, high-risk features, a predatory pricing strategy also exposes the firm to treble-damage liability if the practice is detected and challenged.

See, e.g., Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 266 (1981); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 712-713 (1975); *Southern Pacific Communications* v. *AT&T*, 740 F.2d 980, 1003-04 (D.C. Cir. 1984); *MCI Communications* v. *AT&T*, 708 F.2d 1081, 1112-13 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031-38 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

The elusive distinction between predatory pricing and competitive pricing has prompted courts to apply rigorous standards of proof to predatory-pricing claims. *See, e.g., William Inglis & Sons Baking Co.*, 668 F.2d at 1033-36; *Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377, 1388 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). A court will not lightly find a predatory pricing violation, even when confronted with evidence of actual prices. *Id.* ("Plaintiff must prove by clear and convincing evidence—i.e., that it is highly probably true—that the defendant's pricing policy was predatory.") But if the decision below stands, competitors will be able to prevent mergers merely by asserting that a newly-merged rival would have a greater capacity to engage in aggressive pricing which is itself highly unlikely to be found predatory. Under the cloud of litigation which the decision would encourage, few mergers could survive.[6]

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[6] The difficulties inherent in identifying and proving instances of predatory pricing also make it a difficult claim to defend. *See* Austin, *supra* at 1361 (the predatory pricing "allegation intimidates because of the vague or overly complicated definitions that are applied in determining illegality"). Given the sensitivity of merger transactions to delay, the costs of defending a complicated antitrust suit, and the uncertainty of the outcome, it is predictable that in most instances a lawsuit would defeat the transaction.

The Tenth Circuit's decision threatens to circumscribe the kind of procompetitive behavior that the antitrust laws were intended to protect. Cost reductions achieved through efficient mergers can and should lead to price reductions. It makes no sense to permit competitors to have standing when the only injury they can conjure up is highly unlikely ever to materialize, and when the mere existence of litigation is much more likely to thwart mergers that will increase competition and productive efficiency.

This Court does not have to hold that a competitor never has standing to oppose a merger; there may be situations where competitor injury is a realistic probability. For example, there may be a genuine threat of market foreclosure.[7] But on the facts presented here no present or predictable antitrust injury exists. Moreover, this plaintiff clearly will have standing to sue if the merged entity actually engages in conduct that presents an identifiable threat of antitrust injury, and appropriate remedies can be fashioned at that time. The fact of merger will not make those remedies any less effective.

In summary, if antitrust standing is upheld under the circumstances of this case, it would have a chilling effect on competition and would create undesirable restrictions on efficient business arrangements. If antitrust standing is denied here, the procompetitive policies of the antitrust laws will be vindicated.

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[7] *Cf. Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985).

CONCLUSION

For the foregoing reasons, and the reasons given in the Brief for the United States as Amicus Curiae, this Court should reverse the judgment below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

12

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARGILL, INC. and EXCEL CORPORATION,

Petitioners,

—v.—

MONFORT OF COLORADO, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR ROYAL CROWN COLA CO. AS AMICUS CURIAE

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PRELIMINARY STATEMENT

Royal Crown Cola Co. ("Royal Crown") respectfully submits this brief as *amicus curiae* pursuant to Rule 36 of the Rules of this Court, with the consent of petitioners, Cargill, Inc. ("Cargill") and Excel Corporation ("Excel") (collectively "petitioners"), and of respondent, Monfort of Colorado, Inc. ("respondent" or "Monfort").[1] Royal Crown supports the position of respondent insofar as Royal Crown urges this Court to reject the proposed rule denying competitors standing to challenge acquisitions that pose a threat of predatory pricing—irrespective of the substantiality of the threat—volunteered in the *amicus* filing of the Department of Justice and the Federal Trade Commission (collectively, the "Government").

1 The written consent of counsel for both petitioners and respondent was submitted with this Brief to the Clerk of the Court.

Royal Crown requests that the Court restrict its ruling to whether the specific injury that threatens Monfort in this case is redressable under the antitrust laws.

INTEREST OF THE AMICUS

Royal Crown is a Delaware corporation that produces concentrate used in the production of nationally branded carbonated soft drinks. The interest of Royal Crown in this case arises from its desire to contest the acquisition of The Seven-Up Company by PepsiCo, Inc., and the acquisition of Dr Pepper Company by The Coca-Cola Company, as violative of the antitrust laws. Royal Crown would like to be in a position to institute such a challenge based, among other grounds, on its status as a competitor of the parties to these transactions.

Royal Crown is threatened with real antitrust injury. To the extent that the question presented in the instant case involves a competitor's standing under §§ 7 and 16 of the Clayton Act, 15 U.S.C. §§ 18 and 26 (1982), its resolution may bear directly on Royal Crown's effort to oppose, under those and other provisions, the acquisitions by PepsiCo, Inc. and The Coca-Cola Company. Adoption of the Government's categorical standing rule could inhibit pursuit of a legitimate antitrust claim even by a competitor such as Royal Crown.

SUMMARY OF ARGUMENT

Royal Crown urges this Court to reject unequivocally the Government's proposed categorical standing bar in cases of threatened predatory pricing on three separate grounds. First, the Government's standing proposal is fundamentally flawed because it is based on the Government's assessment that predatory pricing is unlikely to occur, rather than on the rationale commanded by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Accordingly, the Government's proposed standing rule would deprive plain-

tiffs of their day in court when threatened by real antitrust injury simply because the Government doubts their ability to prove that such an injury is threatened.

Second, the proposed bar would substitute an inflexible rule of law for the particularized examination of the facts and circumstances of each case that this Court has prescribed as the basis for antitrust standing determinations. Moreover, the Government would rewrite the law of standing in a case where this Court does not have the benefit of full adversary argument on the Government's proposal by the parties, or of the consideration and disposition of that proposal by the courts below.

Third, if the Court does consider the Government's standing proposal, it should restrict its application only to competitor allegations of threatened below-cost predatory pricing. The Court should carefully circumscribe any ruling on competitor standing to insure that competitors alleging antitrust injury from sources other than predatory pricing are not precluded from a right of action under sections 7 and 16 of the Clayton Act.

ARGUMENT

POINT I

THE GOVERNMENT'S STANDING PROPOSAL IS NOT BASED ON THIS COURT'S RATIONALE IN *BRUNSWICK* AND ACCORDINGLY WOULD INDISCRIMINATELY BAR PLAINTIFFS WHO PROPERLY ALLEGE THREATENED ANTITRUST INJURY.

The Government proposes that the Court issue "a ruling in this case that competitors may not challenge acquisitions on the ground that there is a threat of post-acquisition [below-cost] predatory pricing." (Brief for the Government as Amici Curiae, "Gov't Brief" at 22.)[2] That proposal is fundamentally flawed because it is based on the Government's unsupported hypothesis that competitor injury from predatory pricing is unlikely to occur, rather than on the rationale commanded by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

In *Brunswick*, this Court established that the plaintiff's injury must be "of the type the antitrust laws were intended to prevent and . . . [must] flow[ ] from that which makes defendant's acts unlawful." 429 U.S. at 489. A proper *Brunswick* standing analysis thus assesses whether the alleged injury lies within the protective scope of the antitrust laws. The Government's proposed standing rule, however, does not undertake or accommodate that assessment, and indeed ignores it. Rather, the proposed rule bars allegations of threatened predatory pricing because of the supposed "remoteness of the possibility that an acquisition will lead to predatory pricing." (Gov't Brief at 10.) The Government's standing proposal thus confuses the "probability" of the injury with the "nature" of the injury on which this Court focused in *Brunswick*.

2 The Government defines predatory pricing as pricing below cost with the intent to destroy competitors and later raise prices. (Gov't Brief at 9, 19.)

By improperly relying on its own prophecy that predatory pricing injury is unlikely to occur, the Government's proposed standing rule would deprive plaintiffs with real *Brunswick* injury from their rightful day in court. Contrary to the Government's premise that competitors cannot demonstrate threatened antitrust injury from predatory pricing, this Court has expressly contemplated that such injury can be proven before the competitor is driven from the market. *Brunswick*, 429 U.S. at 489 n.14. Even petitioners concede that if an acquisition genuinely threatens to enable the merged firm to engage in predatory conduct, a competitor would have a right to Section 16 relief. (Petitioners' Brief at 30; *see also* Brief for the Business Roundtable as *Amicus Curiae* at 10.) Plaintiffs who allege real antitrust injury should not be barred from court simply because the Government doubts their ability to prove that such an injury is threatened.[3]

Whether a plaintiff is in fact threatened with harm from an anticompetitive pricing scheme can be assessed only after the plaintiff has had an opportunity to develop at trial the facts and circumstances surrounding his claim. The Government's proposal, by substituting an indiscriminate legal standard for the inquiry commanded by *Brunswick*, is unfaithful to the very precedent on which the Government acknowledges antitrust standing analysis is based. (Gov't Brief at 13.)

3 In areas outside the antitrust field, this Court has recognized that the standing inquiry is properly directed at whether the injury asserted is within the protective scope of the statute invoked, and not at the substantive merits of the plaintiff's claim for relief. *See, e.g.*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-58 (1970) (standing test rejected because it did not pertain to whether the injury asserted was within the zone of interest to be protected by the statute at issue but rather pertained to the merits of the claim alleged.)

POINT II

THE GOVERNMENT'S CATEGORICAL PROPOSAL TO LIMIT STANDING IS CONTRARY TO THE COURT'S RECENT RECOGNITION THAT ANTITRUST STANDING DETERMINATIONS DEPEND ON THE SPECIFIC CIRCUMSTANCES OF EACH CASE, AND WOULD UNWISELY TRANSFORM ECONOMIC ORTHODOXY INTO A RULE OF LAW WITHOUT THE CONSIDERATION OF THE PARTIES OR THE COURTS BELOW.

The Government's categorical standing proposal also violates this Court's recent instruction that a full analysis of the injury alleged in the particular case should inform the standing determination. Moreover, adopting the Government's proposed standing rule in this case is especially inappropriate because the proposal has not been advanced by the parties here or in the proceedings below, has not been considered by either the District Court or the Court of Appeals, and apparently has never been adopted by any federal court at any level.

Contrary to the Government's proposal, this Court requires that determinations of whether a party has antitrust standing must be based on a careful investigation of the particular facts alleged, or after trial, of the facts proven. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court noted that broad generalizations designed to provide a standing rule "may lead to contradictory and inconsistent results." *Id.* at 536 n.33 (citing Sherman, "Antitrust Standing: From *Loeb* to *Malamud*," 51 N.Y.U. L. REV. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case")). The Court concluded that the "infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule" that will determine in every case whether the plaintiff has standing to sue under the antitrust laws. *Associated General Contractors*, 459 U.S. at 536-37. Thus, "[i]n each case [plaintiff's] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." *Id.* at 540. Similarly, the Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477-85 (1982), fully explored the alleged facts giving rise to the plaintiff's injury before concluding that her injury "was inextricably intertwined" with the anticompetitive effects of the asserted antitrust violation, and thus provided a sufficient basis for standing.

The Court's sensitivity to the unique circumstances of each case in standing inquiries reflects its increasing reluctance to adopt categorical antitrust rules—such as that proposed by the Government here—based on what is thought to be the economic orthodoxy of the day. Recent antitrust jurisprudence teaches that rules of law incorporating prevailing economic doctrines have often required revision, and sometimes reversal, after experience reveals the shortcomings of the theory upon which those rules were based. In short, harsh legal rules predicated on economic policy are dangerous because the economic policy may simply be wrong. For example, the Court reversed a categorical presumption of liability in cases of nonprice vertical restrictions, and substituted a rule-of-reason approach in response to a developed understanding of the economic utility of those restrictions. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *overruling United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). This tendency to avoid uncritical application of rules of *per se* liability, *cf. National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. ___, ___ n.26, 104 S. Ct. 2948, 2962 n.26 (1984), equally opposes adoption of categorical rules shielding practices from legal attack. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 795-96 (1984) (Stevens, J., dissenting).

Categorical rules are even less likely to advance the purposes of the antitrust laws where the judiciary lacks substantial experience with a given practice and its economic effects remain uncertain. In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court reaffirmed "the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Id.* at 349 n.19 (emphasis in original). *See Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 9 (1979) ("[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . .") (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972)).

Application of these principles to this case counsels strongly against adopting the Government's categorical proposal to deny competitors standing in all cases of threatened predatory pricing. The driving force behind that proposal is the Government's present view of the contours and consequences of predation. Yet, both the petitioners here and the Court of Appeals below noted that the forms and anticompetitive effects of predatory pricing remain subject to vigorous debate. (Petitioners' Brief at 30-31; Petitioners' Appendix at 8a-9a.) As James C. Miller III and Paul Pautler summarized, "the intellectual debate concerning predation, and especially appropriate legal rules for dealing with it, is not over." Miller & Pautler, *Predation: The Changing View in Economics and the Law*, 28 J. LAW & ECON. 495, 496 (1985).

Finally, adoption of the Government's proposed standing rule in this case would be especially dangerous in light of the lack of consideration given the proposal in the courts below and by petitioners before this Court. Petitioners state candidly:

> Excel consistently has acknowledged that if a competitor establishes that an acquisition genuinely threatens to enable the merged firm to engage in predatory conduct, the competitor would have a right to Section 16 relief. JA 436-40 [citing petitioners' briefs submitted in the Court of Appeals below].

(Petitioners' Brief at 30.) Since the only party that could have advanced the Government's standing proposal below has continually disavowed it, no investigation of that rule's implications appears in the record now before this Court. The absence of such an investigation is not remedied by other cases; the Government cites no case as having adopted or rejected its proposed rule and we are aware of none. The Government thus asks the Court to adopt its broad standing bar in a judicial vacuum. Without the guidance gained from full briefing by the parties and judicial consideration below, this Court is deprived of the important benefits of the adversarial process that should inform its consideration of any categorical rule. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) ("[A]dvance[d] expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give.") (Frankfurter, J.).

In sum, antitrust analysis is too complex and its evolution too constant to write into law categorical rules that derive from the orthodox economic policy of the day. Far more reasonable than the Government's broad standing bar is this Court's teaching derived from *Associated General Contractors* and *McCready*: Whether a competitor is to be accorded standing must be determined by an analysis of the allegations of injury that he has made, in light of the facts and circumstances asserted in each case.

POINT III

THE GOVERNMENT'S STANDING PROPOSAL DOES NOT PURPORT BY ITS TERMS, AND SHOULD NOT BE CONSTRUED, TO BAR COMPETITORS ALLEGING ANTITRUST INJURY FROM SOURCES OTHER THAN BELOW-COST PREDATORY PRICING.

If the Court does consider the Government's proposal, it should carefully circumscribe the rule's scope to insure that competitors alleging antitrust injury from sources other than predatory pricing are not precluded from a right of action under the Clayton Act. Since the Government's proposal has not been litigated below, the factual background that ordinarily would outline the limits of that proposal is absent from this case. Without clear direction, subsequent courts could well be invited to embrace an overly broad application of the Government's standing rule.

Contributing to this potential for mischief is the contention of petitioners that the only anticompetitive consequences of mergers are oligopoly pricing and predation. (Petitioners' Brief at 18.) That dichotomy is overly restrictive in the extreme, as the decided cases noted below have recognized. It is likely, of course, that petitioners did not attempt an exclusive listing, but were merely addressing the facts of this case. (*Compare* Reply Brief of Petitioners in the Court of Appeals, J.A. at 438, *with* Petitioners' Brief at 18.) In any event, petitioners have not advocated categorical preclusion of standing even in predatory pricing cases. (Petitioners' Brief at 30.)

The Government itself carefully limits the application of its standing rule to allegations of threatened injury from post-acquisition, below-cost predatory pricing. (Gov't Brief at 10, 21-25.) The Government does not contend that a competitor could never be threatened with redressable antitrust injury under sections 7 and 16 of the Clayton Act. Indeed, both the petitioners and *amicus curiae*, the Business Roundtable, concede that there are circumstances in which an acquisition could interfere anticompetitively with a competitor's business. (Petitioners' Brief at 30; J.A. at 436-40; Brief for the Business Roundtable at 10.) In such a case, the Government does not question the standing of a competitor to seek an injunction against the proposed acquisition.

Courts repeatedly have held acquisitions violative of section 7 of the Clayton Act for their anticompetitive injuries to competitors. Among those injuries are retail market foreclosure, *see, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 575 (1967); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 555 (N.D. Ill. 1968), and inhibited access to essential distribution facilities, *see, e.g., Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir.), *cert. dismissed*, ____ U.S. ____, 105 S. Ct. 1155 (1985); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147-49 (N.D. Cal.), *aff'd*, 385 U.S. 37 (1966). Acquisitions could also provide the acquiring firm with sufficient market dominance to eliminate competitors through predatory means that do not involve below-cost predatory pricing or even a short-term loss/long-term gain design. *Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, ____ U.S. ____, 105 S. Ct. 2847 (1985). Properly delimited, the Government's rule takes aim at none of these targets; this Court should ensure that its opinion does not inadvertently hit them.

CONCLUSION

For the foregoing reasons, Royal Crown requests the Court to reject entirely the Government's proposed standing bar against all competitors alleging antitrust injury from threatened post-acquisition predatory pricing.

Dated: New York, New York
May 12, 1986

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